Supreme Court, U.S.
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In The

Supreme Court of the United States

October Term, 1997

J.A. CROSON COMPANY,

Petitioner,

v.

J.A. GUY, INC., ET AL.,

Respondents.

On Petition For A Writ Of Certiorari
To The Supreme Court Of Ohio

PETITION FOR A WRIT OF CERTIORARI

RONALD L. MASON*
THOMAS M.L. METZGER
PATRICK M. O'NEILL
KEGLER, BROWN, HILL & RITTER
65 East State Street, Suite 1800
Columbus, Ohio 43215
(614) 462-5400
Counsel for Petitioner
**Counsel of Record*

July 7, 1998

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OR CALL COLLECT (402) 342-2831

QUESTION PRESENTED

Whether federal law preempts the State of Ohio's exercise of its traditional police powers to enforce its prevailing wage law prohibiting the rebate to employers of employee wages earned on state construction projects, where such rebates are used to fund union "job targeting programs."

PARTIES TO THE PROCEEDING

The parties to the proceedings below and before this Court are the Petitioner, J.A. Croson Company,[1] and the Respondents, J.A. Guy, Inc. and The United Association of the Plumbers and Pipe Fitters Industry of the United States and Canada Local 189 ("Local 189").

The State of Ohio, Ohio Bureau of Employment Services; the Associated Builders and Contractors, Inc; The National Electrical Contractors Association and National Electrical Contractors Association, Ohio Conference; The Building and Construction Trades Department, AFL-CIO and The Ohio State Building and Construction Trades Council, AFL-CIO; and The Mechanical Contractors Association, Ohio Chapter, each participated as *amicus curiae* in the proceedings below.

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[1] Petitioner J.A. Croson Company has no parent or subsidiary company.

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES v

OPINIONS BELOW 1

JURISDICTION 1

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED 2

STATEMENT OF THE CASE 3

STATEMENT OF FACTS 6

A. The Job Targeting Program 6

B. The Construction Contracts 7

REASONS FOR GRANTING THE WRIT 9

A. The Supreme Court Of Ohio's Decision In This Case Is In Direct Conflict With Decisions Of This Court And The Circuit Courts, And The Question Presented Is Of National Importance 9

B. The Question Presented Is National In Scope Dealing With Millions Of Dollars That Are Illegally Refunded To Contractors Each Year 11

THE DECISION OF THE OHIO SUPREME COURT IS IN DIRECT CONFLICT WITH DECISIONS OF THIS COURT AND THE CIRCUIT COURTS 13

A. Job Targeting Programs Are Not Absolutely Protected Under The National Labor Relations Act 13

1. This Court's Decision In *Dillingham* Warrants That The State Of Ohio's Effort To Exercise Its Police Power Pursuant To Its Prevailing Wage Law Is Not Preempted Under *Garmon* 14

TABLE OF CONTENTS – Continued

Page

2. The Federal Circuit Courts Disagree With The Conclusion That Job Targeting Programs Are Absolutely Protected Under The NLRA 16

B. Ohio's Imposition Of Minimum Labor Standards Is Not Preempted Under The National Labor Relations Act 19

1. *Garmon* Does Not Preempt The Establishment Of State Or Federal Minimum Labor Standards, Including Ohio's Prevailing Wage Law Or Claims Made Thereunder..... 20

2. A Proper Analysis Would Have Used The "Arguably Protected" Standard Under *Garmon* 25

3. This Matter Is Not Preempted Under *Garmon* Because The Controversy Presented To The State Court Is Not Identical To That Which Could Have Been Presented To The NLRB..... 26

CONCLUSION 29

TABLE OF AUTHORITIES

Page

CASES

Building and Construction Trades Department v. Reich, 40 F.3d 1275 (D.C. Cir. 1994) ..... *passim*

Building and Construction Trades Council of Metro. Dist. v. Associated Builders and Contractors of Mass./Rhode Island, Inc., 507 U.S. 218 (1993) 14

California Div. of Labor Standards Endorcement of Dillingham Construction, 519 U.S. 316 (1997) ... *passim*

Communication Workers of America v. Beck, 487 U.S. 735 (1988) 17

Dillingham Construction, Inc. v. County of Sonoma, 57 F.3d 712 (9th Cir. 1995) 15

Dillingham Construction, Inc. v. County of Sonoma, 778 F. Supp. 1522 (N.D. Calif., 1991) 15

Farmer v. United Broth. of Carpenters and Joiners of America, Local 25, 430 U.S. 290 (1977) 20

Fort Halifax Packing Co., Inc. v. Coyne, 482 U.S. 1 (1987) 15, 22

General Elec. Co. v. New York State Dept. of Labor, 698 F. Supp. 1093 (S.D.N.Y. 1988) 23

Int'l Broth. of Elec. Workers et al. v. Aubry, 41 Cal. App. 4th 1632, 49 Cal. Rptr. 2d 759 (Calif. App., 1996) 18, 29

International Broth. of Elec. Workers v. Brock, 68 F.3d 1194 (9th Cir. 1995) 10, 11, 17

TABLE OF AUTHORITIES – Continued

Page

J.A. Croson Co. v. J.A. Guy, Inc., 81 Ohio St. 3d 346 (Ohio 1998) 11, 13, 25

Linn v. Plant Guard Workers, 383 U.S. 53 (1966) 18

Manno Electric, Inc. NLRB Case No. 15-CA-11891 (1996 WL 276357) 13, 17, 29

Metropolitan Life Ins. Co. v. Massachusetts, 471 U.S. 724 (1985) ..... *passim*

Metropolitan Life Insurance Co. v. Massachusetts, 471 U.S. 722 (1985) 19

Michigan United Food and Commercial Workers Unions v. Baerwaldt, 767 F.2d 308 (6th Cir. 1984) 23

New York State Conference of Blue Cross and Blue Shield Plans v. Travelers Ins. Co., 514 U.S. 645 (1997) 14

San Diego Building Trades Council v. Garmon, 359 U.S. 236 (1959) ..... *passim*

Sears Roebuck & Co. v. San Diego Dist. Council of Carpenters, 436 U.S. 180 (1978) 13, 19, 25, 27

STATUTES/REGULATIONS

28 U.S.C. § 1257(a) 1, 2

29 U.S.C. § 157 2

29 U.S.C. § 158 2

TABLE OF AUTHORITIES – Continued

Page

Ohio Administrative Code § 4101:9-4-07(B)(6) ... 3, 4, 5

Ohio Administrative Code § 4101:9-4-07(C)(2) 3, 4

Ohio Revised Code § 4115.01 4

Ohio Revised Code § 4115.07 .....2, 4

Ohio Revised Code § 4115.10(D) 3, 4, 5, 6

Ohio Revised Code § 4115.16(A) 8

OTHER AUTHORITY

Northrup, Herbert R. & Augustus T. White, *Subsidizing Contractors To Gain Employement: Construction Union "Job Targeting"*, 17 *Berkeley Journal of Employment and Labor Law* 62 (1996)..... 12, 18, 24, 28

CONSTITUTIONAL PROVISION

Supremacy Clause, Article VI, Clause 2 2

PETITION FOR A WRIT OF CERTIORARI

The Petitioner J.A. Croson Company respectfully prays that a writ of certiorari issue to review the judgment of the Supreme Court of Ohio which entered its Decision on April 8, 1998.

OPINIONS BELOW

In this matter there are three decisions and/or orders from the state courts below, each of which is reproduced in the accompanying appendices. The March 28, 1995, Opinion of the Court of Common Pleas, Pickaway County, Ohio, and accompanying Judgment Entry of April 8, 1995 granting summary judgment against Petitioner J.A. Croson Company, are reproduced in Appendix C. (App. 80a) and Appendix D. (App. 87a), respectively. The October 4, 1996, Decision and Judgment Entry of the Court of Appeals of Ohio, Fourth Appellate District reversing the decision of the Court of Common Pleas, is reproduced in Appendix B. (App. 24a). Lastly, the April 8, 1998 Decision of the Ohio Supreme Court is reproduced in Appendix A. (App 1a).

JURISDICTION

The Decision of the Ohio Supreme Court was entered on April 8, 1998, reversing the Decision of the Court of Appeals of Ohio, Fourth Appellate District. Pursuant to Rule 13.1 of the Rules of the Supreme Court of the United States, Petitioner J.A. Croson Company has filed this Petition for Writ of Certiorari within ninety calendar days after the Judgment Entry of the Supreme Court of Ohio.

The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Supremacy Clause, Article VI, Clause 2 of the Constitution of the United States provides that:

> This Constitution, and the Laws of the United States which shall be made in Pursuance thereof and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land . . .

Additionally, 28 U.S.C. § 1257(a) ("State courts; certiorari") provides as follows:

> (a) Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court by a writ of certiorari where the validity of a treaty or statute of the United States is drawn in question or where the validity of a statute of any State is drawn in question on the ground of its being repugnant to the Constitution, treaties, or laws of the United States, or where any title, right, privilege, or immunity is specially set up or claimed under the Constitution or the treaties or statutes of, or any commission held or authority exercised under, the United States.

Ohio Revised Code § 4115.07, provides, in part, that all contractors working on a public contract who are obligated pursuant to Ohio's prevailing wage law to pay not less than the prevailing rate of wages "shall make full payment of such wages in legal tender, without any deduction for food, sleeping accommodations, transportation, use of small tools, or any other thing of any kind or description."

In addition, Ohio Revised Code § 4115.10(D) provides, in part, that where the prevailing wage rate applies:

> no person, either for himself or any other person, shall request, demand, or receive, either before or after such workman is engaged, that such workman pay back, return, donate, contribute, or give any part or all of said workman's wages, salary, or thing of value, to any person, upon the statement, representation, or understanding that failure to comply with such request or demand will prevent such workman from procuring or retaining employment, and no person shall, directly or indirectly, aid, request, or authorize any other person to violate this section.

Finally, Ohio Administrative Code § 4101:9-4-07(B)(6) provides that deductions from an employee's pay do not include union "special assessments." Ohio Administrative Code § 4101:9-4-07(C)(2) provides that in order for a union special assessment to be lawful,

> The employer does not make a profit or benefit directly or indirectly from the deduction in any form, including, but not limited to, commissions or dividends.

STATEMENT OF THE CASE

This action concerns a State's ability to exercise its police power to enforce its prevailing wage requirements with respect to union and non-union contractors. On June 15, 1993, Petitioner J.A. Croson Company ("Croson") filed a complaint in the Pickaway County, Ohio, Court of Common Pleas asserting that Respondent J.A. Guy, Inc. ("J.A. Guy") unlawfully deducted money from employees' wages above and beyond regular union dues in order to fund a union "job targeting" program run by Respondent, The United Association of the Plumbers and Pipe Fitters

Industry of The United States and Canada Local 189 ("Local 189"). The job targeting deduction lowers the wages paid by J.A. Guy below the mandatory minimum prevailing wage established pursuant to Ohio's prevailing wage law, Ohio Revised Code, Chapter 4115, and the accompanying regulations. The job targeting deduction also causes employees to rebate wages to their employer in violation of Ohio Administrative Code §§ 4101:9-4-07(B)(6) and (C)(2).

Croson alleged in its Complaint that J.A. Guy violated Ohio's prevailing wage law, Ohio Revised Code § 4115.01 *et seq.*, where it requires all contractors working on a public contract who are obligated pursuant to the prevailing wage law to pay not less than the prevailing rate of wages, "shall make full payment of such wages." O.R.C. § 4115.07. The basis for Croson's allegation was that, pursuant to the job targeting program, the employees of J.A. Guy had two percent of their gross wages deducted, and this money was ultimately returned to J.A. Guy, and not the employees. Therefore, the employees were paid less than the required prevailing wage.

In addition, Croson alleged that J.A. Guy violated O.R.C. § 4115.10(D)(6). That Section provides, in part, that where the prevailing wage rate applies:

> no person, either for himself or any other person, shall request, demand, or receive, either before or after such workman is engaged, that such workman pay back, return, donate, contribute, or give any part or all of said workman's wages, salary, or thing of value, to any person, upon the statement, representation, or understanding that failure to comply with such request or demand will prevent such workman from procuring or retaining employment, and no person shall, directly or indirectly, aid,

request, or authorize any other person to violate this section.

O.R.C. § 4115.10(D).

Finally, Croson alleged that J.A. Guy violated regulations to Ohio's prevailing wage law, O.A.C. §§ 4101:9-4-07(B)(6) and (C)(2). Those regulations establish that "special assessments," which would include job targeting deductions, are specifically excluded from the list of permissible deductions, and that employers may not profit or benefit directly or indirectly from any special assessment taken from employees' wages. *Id.*

On March 28, 1995, the Court of Common Pleas, Pickaway County, Ohio, held that Croson could not proceed with its complaint because federal law preempted those portions of Ohio's prevailing wage law upon which Croson relied. (App. 80a).

Croson appealed from the trial court's decision to the Fourth District Court of Appeals, Pickaway County, Ohio. The Court of Appeals reversed the trial court's decision, finding that Ohio's prevailing wage law was not preempted by federal law. (App. 24a) The court reasoned that " '[t]he state is simply attempting to define what counts as payment of prevailing wages for purposes of its own competitive bidding statutes. This is surely a process which is both innocuous and necessary.' " (App. 77a)

Thereafter, J.A. Guy and Local 189 filed Notices of Appeal with the Ohio Supreme Court and also requested the Court of Appeals to certify a conflict based upon two prior Ohio appellate court decisions. The Court of Appeals certified a conflict to the Ohio Supreme Court.

On January 29, 1997, the Ohio Supreme Court accepted the discretionary appeals and concluded that a conflict exists. In its Decision dated April 8, 1998, the Supreme Court of Ohio ruled that Section 7 of the National Labor Relations Act ("NLRA") preempts state regulation through the prevailing wage law under Ohio

Administrative Code 4101:9-4-07(B)(6) and Ohio Revised Code 4115.10(D) based upon the court's conclusion that job targeting programs are absolutely protected under the NLRA. (App. 1a).

STATEMENT OF FACTS

A. The Job Targeting Program

The primary basis for Croson's Petition for Writ of Certiorari is the conflict between the Supreme Court of Ohio's finding that Ohio's effort to enforce a minimum prevailing wage standard is preempted by federal law, and decisions of this Court as well as decisions of two Circuit Courts of Appeals that have upheld the enforcement of prevailing wage standards in the face of union job targeting programs. Job targeting deductions are not union dues. Separate and distinct from regular union dues, 2% of the gross wages earned by employees of union contractors, such as Respondent J.A. Guy, is transferred to unions, such as Respondent Local 189. Unlike union dues, Local 189 does not use the money for its own expenses but gives the money back to the union contractors. In effect, as a result of this special 2% job targeting deduction, union workers who work on prevailing wage jobs receive *less than the minimum prevailing wage rate mandated by Ohio law* – and union employers pay out less than the minimum prevailing wage rate.

By taking money out of union workers' pockets and then giving the money to the union contractors, the union contractors lower their labor costs below the level of non-union companies who are required to pay the full wage rate as required by Ohio's prevailing wage law. In essence, through these special wage deductions for job targeting, employees subsidize their employers (unlike union dues which are used to subsidize the activities of the union). Because a union contractor can lower its labor costs at the expense of its employees, it can submit bids

lower than other contractors. The money received from Local 189 directly reduces the union contractor's wage rate below the prevailing wage rate. And because the money for job targeting comes out of employees' paychecks, the employees are underpaid compared to the prevailing wage standards.

The 2% job targeting deduction is separate from and in addition to union dues (union dues being a deduction that is never for the benefit of the union contractor). For example, the collective bargaining agreement between Respondent J.A. Guy (and other union contractors) and Respondent Local 189 lists union dues as just 1¾%, and then identifies a separate 2% Market Recovery Assessment for job targeting. Consistent with this separate designation, the 1¾% union dues deduction "pays for the operation of Local 189" – meaning dues money is used to pay the operating expenses of Local 189, which includes wages, fringes, rent, utilities, and real estate taxes for the union. On the other hand, the money received from the 2% deduction for job targeting is given to the union contractors. In fact, the job targeting funds are solely "monies paid by the individual to enhance the targeted recovery program" and therefore not for the operating expenses of the union.

B. The Construction Contracts

The State contracts underlying this matter involve construction of the Pickaway County, Ohio Jail ("Jail Project") and the Water Softening System for the Jail Project. Both of these jobs were prevailing wage jobs, meaning that Ohio established minimum wages to be paid to employees working on the projects. Prior to submitting a bid on the Jail Project, J.A. Guy requested Local 189 to target the job. Local 189 agreed to do so and informed the union contractors bidding on the project that it would

provide a kickback from the job targeting fund in the amount of $9.00 per hour.

With the knowledge that its labor costs would be reduced by $80,000 to $100,000 through the job targeting kickback, J.A. Guy lowered its bid on the Jail Project accordingly. Petitioner Croson's bid on the Jail Project was $813,768 – or just $8,768 more than the bid submitted by J.A. Guy. Due solely to the promised kickback of money from Local 189, J.A. Guy was the low bidder on the plumbing contract for the Jail Project, and was awarded the contract. Over the life of the Jail Project, J.A. Guy received a total of $89,834 in kickbacks from the Local 189 job targeting program.

Following the completion of the Jail Project, it became necessary to install a water softening system at the facility. On the Water Softener Project, Croson bid $28,749 – or just $1,249 more than the bid submitted by J.A. Guy. The contract for the Water Softener Project was also awarded to J.A. Guy. Although the Water Softener Project was not a targeted job, J.A. Guy deducted 3¾% from its employees' wages on the Water Softener Project, and that total deduction included the 2% job targeting deduction. Moreover, during the months in which J.A. Guy was working on the Water Softener Project, J.A. Guy received job targeting checks on two separate targeted jobs in the amount of $18,679.50.

Pursuant to the Ohio Prevailing Wage Statute, Ohio Revised Code § 4115.16(A), Croson as an interested party filed complaints with the State of Ohio, Department of Industrial Relations. After conducting an investigation, the State of Ohio issued a determination that the job targeting deductions for the Water Softener Project violated Ohio's prevailing wage statute. (App. 89a) Before the State of Ohio completed its investigation of the Jail Project pursuant to the Ohio Prevailing Wage Statute, Croson filed suit in the Court of Common Pleas, Pickaway County, Ohio.

REASONS FOR GRANTING THE WRIT

A. The Supreme Court Of Ohio's Decision In This Case Is In Direct Conflict With Decisions Of This Court And The Circuit Courts, And The Question Presented Is Of National Importance

In this case, the Supreme Court of Ohio concluded that the State cannot exercise its traditional police power to set minimum standards for wages paid to employees working on state contracts, where those standards prevent the rebate of employee wages to union contractors under job targeting programs. The Ohio court erroneously concluded that, because job targeting programs have been said to be protected by the NLRA, any effort by the State to regulate the collection of funds for use in such programs is preempted by federal law.

The decision for which Petitioner Croson seeks review by this Court in direct conflict with decisions of this Court and of at least two Circuit Courts of Appeals, and the question presented for review is of national importance. In *California Div. of Labor Standards Enforcement v. Dillingham Construction*, 519 U.S. 316 (1997), this Court considered whether the State of California's prevailing wage law was preempted by federal law pursuant to the Employee Retirement Income Security Act of 1974 ("ERISA"). As with Ohio's prevailing wage law, California's prevailing wage law establishes minimum wage standards that apply to contractors working on state contracts. Despite the "broad" and "expansive sweep" of preemption under ERISA, this Court concluded that California's prevailing wage law was not preempted under ERISA because "the wages paid on state public works have long been regulated by the states," and prevailing wage laws are no different than other uses of a state's traditional police power "which Congress could not possibly have intended to eliminate." *Id.* at 342. The present case affords the Court a significant opportunity to

address the States' ability to enforce minimum standards for wages in the context of a preemption challenge pursuant to the National Labor Relations Act, and to correct the clear conflict between the decision of this Court in *Dillingham* and the decision of the Supreme Court of Ohio in the present case.

In addition, at least two federal Circuit Court decisions preceding the *Dillingham* decision reasoned that a job targeting deduction is not a permissible deduction under the federal prevailing wage law. The federal prevailing wage law, otherwise known as the Davis-Bacon Act, is essentially the same as Ohio's prevailing wage law with respect to the issues presented in this case. Having found that job targeting deductions are not permissible, the courts have concluded that the federal government may enforce a minimum standard for wages on its contracts despite the impact such regulation may have upon agreements between unions and union members relating to job targeting.

Specifically, in *Building and Construction Trades Department v. Reich*, 40 F.3d 1275 (D.C. Cir., 1994), the court concluded that a job targeting deduction was not a permissible deduction under the federal prevailing wage law, and therefore the deduction could be prohibited. The court found that the federal prevailing wage law appropriately prohibited the reduction of employees' wages below prevailing rates, even when the reduction was the result of an agreement between union members and their union. *Id.* at 1281-1282. Significantly, the court rejected the union's contention that job targeting deductions are protected under the NLRA, and thereby let stand the government's effort to enforce a minimum prevailing wage in the face of a special assessment such as a job-targeting deduction. *Id.* at 1281-1282.

In *International Broth. of Elec. Workers v. Brock*, 68 F.3d 1194, 1200 (9th Cir., 1995), the court held that a two percent job targeting deduction was prohibited under the

federal prevailing wage law because it improperly required union members to rebate wages for the benefit of their employer. Consistent with the D.C. Circuit's decision in *Reich*, and directly contrary to the decision of the Supreme Court of Ohio in this case, the court concluded that "[T]he NLRA does not change this conclusion," that job targeting deductions are not protected. *Id.* at 1203. In other words, both *Reich* and *Brock* addressed whether the NLRA protected the union job targeting scheme – and directly contrary to the decision of the Supreme Court of Ohio in this case, the courts concluded that no such protection for job targeting deductions could be found under the federal law.

In light of the decisions in *Dillingham*, *Reich*, and *Brock*, the decision of the Supreme Court of Ohio in this case presents a conflict on the critical question of whether a state may exercise its traditional police power to enforce minimum standards for wages. This case will allow the Court to address this fundamental conflict and to address for the first time the permissible scope of a state regulation of minimum standards for wages in the face of the National Labor Relations Act.

B. The Question Presented Is National In Scope Dealing With Millions Of Dollars That Are Illegally Refunded To Contractors Each Year

The scope of the issue before this Court extends far beyond the borders of Pickaway County or the State of Ohio. Indeed, the issue presented here is of national concern. As the Supreme Court of Ohio noted in its decision, "job targeting is a strategy employed nationwide by construction unions." *J.A. Croson Co. v. J.A. Guy, Inc.*, 81 Ohio St. 3d 346, 348 (Ohio 1998). (App. 5a).

Local unions throughout the country have adopted job targeting programs. In fact, job targeting programs have been used by unions in nearly all, if not all, of the

States. *Subsidizing Contractors to Gain Employment: Construction Union "Job Targeting"* Northrup & White, 17 *Berkeley Journal of Employment and Labor Law*, 62, 66-76 (1996). Moreover, at least thirty-three states have enacted prevailing wage laws that, identical to Ohio's prevailing wage law, establish minimum wages to be paid to employees working on state contracts. *Id.* at 80.

Not only are job targeting programs pervasive, but the economic impact of each job targeting program is significant. For instance, the record below indicates that Respondent Local 189 alone distributed over $450,000 each year in job targeting program monies. Similar distributions occur throughout the country in each job targeting program. For example, Local 292 of Minneapolis, Minnesota paid out over $635,000 each year during one five year period. "Market Recovery Fund Works!," IBEW J., Aug., 1993, at 23. The monies that are kicked back to union contractors are used to secure hundreds of millions of dollars worth of contracts each year.[2] Consequently, the question presented in this case, which is in grave need of clarification, is of significant national importance.

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[2] *See*, "Market Recovery Fund Works!," IBEW J., Aug. 1993, at 23 (stating that the Local 292's job targeting program was responsible for securing $74,239,000 in construction work); *See*, "A Bang Up Year," IBEW J., Mar., 1993 at 29 (stating that Local 569 of San Diego, California had funded forty-three jobs with job targeting program monies); See, "Market Recovery Success," IBEW J., Mar., 1995, at 31 (stating that Local 347 of Des Moines, Iowa had funded fifty-six jobs with job targeting program monies).

THE DECISION OF THE OHIO SUPREME COURT IS IN DIRECT CONFLICT WITH DECISIONS OF THIS COURT AND THE CIRCUIT COURTS.

A. Job Targeting Programs Are Not Absolutely Protected Under The National Labor Relations Act

The case concerns the State of Ohio's permissible imposition of minimum labor standards to protect employees working on public contracts, and the State of Ohio's effort to enforce such standards as to all contractors (whether union or not).

The linchpin of the Supreme Court of Ohio's decision is the court's conclusion that job targeting programs are *absolutely protected* by the NLRA, as opposed to "arguably protected" or not protected at all, and that the State of Ohio's laws upon which Croson's claims are based are preempted. (App. 16-17a). Specifically, the Supreme Court of Ohio concluded that because job targeting has been recognized as "protected activity" by the National Labor Relations Board, "the matter is at an end and states are ousted of all jurisdiction." (App. 12a) Citing *San Diego Building Trades Council v. Garmon*, 359 U.S. 236, 79 S.Ct. 773 (1959).[3] By following this analysis, the Ohio Supreme Court avoided addressing the broad exclusions from preemption that would apply because "J.A. Croson could not have presented the identical controversy to the NLRB." (App. 19a). Citing *Sears Roebuck & Co. v. San Diego Dist. Council of Carpenters*, 436 U.S. 180 at 202, 98 S.Ct. 1745, 1760 (1978).

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[3] The Supreme Court of Ohio relied on *Manno Electric, Inc.*, NLRB Case No. 15-CA-11891 (July 20, 1994) (NLRB May 22, 1996), (321 NLRB No. 43, 152 LRRM 1107, 1996 WL 276357) to assert that the act of job targeting is an activity that is protected conduct under section 7 of the NLRA. *J.A. Croson Company v. J.A. Guy, Inc.*, 691 N.E. 2d 655, 664 (Ohio 1998) (App. 16-17a).

1. This Court's Decision In *Dillingham* Warrants That The State Of Ohio's Effort To Exercise Its Police Power Pursuant To Its Prevailing Wage Law Is Not Preempted Under *Garmon*

Inexplicably, the Ohio Supreme Court's decision totally ignored the fact that in February of 1997 this Court unanimously ruled that a state prevailing wage law is *not* preempted by federal law because it is:

> "no different from myriad state laws in areas traditionally subject to local regulation, which Congress could not possibly have intended to eliminate."

California Div. of Labor Standards Enforcement v. Dillingham Construction, 519 U.S. 316 (1997), *quoting New York State Conference of Blue Cross and Blue Shield Plans v. Travelers Ins. Co.*, 514 U.S. 645, 115 S.Ct. 1671, 1683 (1997). In *Dillingham Construction* the Court considered whether California's prevailing wage law was preempted, not under the relatively narrow doctrine of NLRA preemption, but under the far broader and more inclusive preemption doctrine under ERISA, 29 U.S.C. 1144.[4] Under California law, all contractors working on a public contract are required to pay the prevailing wage, however, contractors may pay a lower wage for apprentices so long

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[4] Unlike ERISA, the NLRA does not contain an express preemption provision. *Building and Construction Trades Council of Metro. Dist. v. Associated Builders and Contractors of Mass./Rhode Island, Inc.*, 507 U.S. 218, 224, 113 S.Ct. 1190, 1194 (1993). Therefore, the Supreme Court has explained that it is "reluctant to infer pre-emption" under the NLRA. *Id.* By contrast, since ERISA contains an express preemption provision, ERISA preemption "has a 'broad scope,' an 'expansive sweep,' is 'broadly worded,' 'deliberately expansive,' and 'conspicuous for its breadth.' " *Dillingham Construction*, 519 U.S. 316, 117 S.Ct., at 843 (concurring opinion).

as the contractor sets up an approved apprenticeship program. *Id.* 117 S.Ct., at 835. One of the subcontractors for Dillingham Construction was said to have violated the prevailing wage law by paying apprentices the lower wage rate without approval. The contractors asserted in the lower courts that the prevailing wage law was pre-empted under both ERISA and the NLRA.[5] In *Dillingham Construction,* this Court issued a unanimous ruling in which it reversed the Ninth Circuit and held that ERISA did not preempt California's law exempting apprentices in state-approved apprenticeship programs from the prevailing wage requirement.

In recognizing the province of state regulation concerning prevailing wage statutes, this Court stated:

> As is always the case in our pre-emption jurisprudence, where "federal law is said to bar state

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[5] Before the district court, the contractors not only argued that the prevailing wage law was preempted under ERISA, but also that it was preempted under the NLRA. Their argument was that the state's enforcement of the prevailing wage rates interfered with the collective bargaining process, conflicted with federal law, and that federal law occupied the field. *Dillingham Construction, Inc. v. County of Sonoma,* 778 F. Supp. 1522, 1530-1534 (N.D. Calif., 1991). The district court rejected every one of the contractors' arguments. *Id.* The district court ruled that because state enforcement of minimum apprenticeship standards constituted a valid "minimum employment standard" they were *not* preempted by the NLRA under *Metropolitan Life Insurance Co. v. Massachusetts,* 471 U.S. 724 and *Fort Halifax Packing Co., Inc. v. Coyne,* 482 U.S. 1 (1987). On appeal, the Ninth Circuit Court of Appeals did not even consider the contractors' assertion of preemption under the NLRA. *Dillingham Construction, Inc. v. County of Sonoma,* 57 F.3d 712 (9th Cir., 1995), and the contractors did not raise the issue of NLRA preemption before the U.S. Supreme Court. *See* Briefs of Petitioner and Respondent Before U.S. Supreme Court, 1996 WL 335251 and 1996 WL 435379.

> action in fields of traditional state regulation . . . we have worked on the 'assumption that the historic police powers of the States were not to be superseded by the Federal Act unless that was the clear and manifest purpose of Congress.' "

Id. 117 S.Ct., at 838, *quoting Travelers Ins. Co.*, 115 S.Ct. 1671, 1683 (emphasis added). A critical piece of the Court's preemption analysis was "the nature and effect of the state law." *Id.* As for the nature and effect of a state prevailing wage law, the Court explained that "the wages paid on state public works have long been regulated by the States," and, as noted above, such laws are no different than any other local regulation "which Congress could not possibly have intended to eliminate." *Id.* at 842. Based in large part upon the protection afforded to traditional areas of local regulation, this Court found that the prevailing wage law was not preempted even under the "broad" and "expansive sweep" of ERISA preemption. *Id.* at 842. Furthermore, this Court stated, "We could not hold pre-empted a state law in an area of traditional state regulation based on so tenuous a relation without doing grave violence to our presumption that Congress intended nothing of the sort." *Id.*

Knowing that this Court had just ruled that prevailing wage laws were not preempted by federal law, at best the Ohio Supreme Court should have used the "arguably protected" analysis under *Garmon*. Had it done so, it would not have found the Ohio laws at issue in this case to be preempted.

2. The Federal Circuit Courts Disagree With The Conclusion That Job Targeting Programs Are Absolutely Protected Under The NLRA

The Ohio Supreme Court's conclusion that job targeting is absolutely protected under the NLRA, and any

attempt to enforce prevailing wage laws against this kickback is preempted, is not only in conflict with this Court's decision in *Dillingham Construction*, but it also conflicts with the federal Circuit Courts of Appeals for the Ninth Circuit and the District of Columbia Circuit. In *Building and Construction Trades Department v. Reich*, (D.C. Cir., 1994), 40 F.3d 1275, the court concluded that a union's two percent job targeting deduction taken from employees' paychecks and returned to the union contractor violated federal prevailing wage law in that the deduction inured to employers, and caused employers to pay less than the mandated prevailing wage. In *International Broth. of Elec. Workers v. Brock* (9th Cir., 1995), 68 F.3d 1194, 1200, the court held that a two percent job targeting deduction "flaunts the express purpose" of the federal prevailing wage law in that it results in "reduction of employee's wages below the prevailing wage rate to the benefit of contractors." The decisions in *Reich*, and *Brock* are contrary to the Ohio Supreme Court's misinterpretation of the administrative decision in *Manno Electric, Inc.*, NLRB Case No. 15-CA-11891, (1996 WL 276357).

Respondents have argued below that *Reich* and *Brock* are distinguishable because they are federal courts ruling on the issue from a federal statute. However, this Court has twice stated that when it comes to NLRB jurisdiction and preemption:

> "[T]he states *as well as the federal courts* must defer to the exclusive competence of the National Labor Relations Board."

San Diego Trades Council v. Garmon, 359 U.S. 236, 245 (1959); and *Communication Workers of America v. Beck*, 487 U.S. 735, 742 (1988) (emphasis added). The absurd result of the Ohio Supreme Court's decision is that job targeting deductions on federal jobs are illegal but those same deductions on state prevailing wage jobs are not illegal because the State of Ohio is not allowed to enforce its

laws regarding the minimum labor standard of a prevailing wage rate.[6]

Buttressing the federal court decisions in *Dillingham Construction, Reich,* and *Brock,* is the state court decision in *Int'l Broth. of Elec. Workers et al. v. Aubry* (Calif. App., 1996), 41 Cal. App. 4th 1632, 49 Cal. Rptr. 2d 759. The issue in *Aubry* was whether job targeting deductions should be treated as regular union dues that count toward the payment of the prevailing wage or something other than dues that could not be credited for purposes of the prevailing wage law. *Id.* at 1636. The state agency responsible for enforcing the state's prevailing wage law concluded that job targeting deductions were *not* union "dues." The court agreed, emphasizing that unlike all other uses to which union dues may be put, these funds "did not go to the union for traditional union purposes, such as supporting health and welfare of members, funding union operations, or creating a strike fund." *Id.*, at 1641. Instead, these job targeting monies "were rerouted or refunded to employers, with the union simply acting as a funnel for the payments." *Id.* For that reason, the job targeting deductions could not be credited toward payment of the prevailing wage law. *Id.* As this Court has explained in *Linn v. Plant Guard Workers* (1966), 383 U.S. 53, where the underlying activity is not protected there is no risk that permitting a state cause of action to proceed would result in the state regulation of conduct that Congress intended to be protected. *Id.*, at 61.

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[6] The result is even more absurd because the federal prevailing wage law is substantially the same as the state prevailing wage laws. In fact, the state laws are generally referred to as "Little Davis-Bacon" statutes. *Subsidizing Contractors to Gain Employment: Construction Union "*Job Targeting," Northrup & White, 17 *Berkeley Journal of Employment and Labor Law* 62 (1996).

Prior to *Dillingham Construction*, this Court had repeatedly recognized that " '[s]tates possess broad authority under their police powers to regulate the employment relationship within the State.' " *Metropolitan Life Insurance Co. v. Massachusetts*, 471 U.S. 722, 747 (1985), *quoting DeCanas v. Bica*, 424 U.S. 351, 356 (1976). The Court has provided numerous examples of such laws, and "[c]hild labor laws, minimum *and other wage laws*, laws affecting occupational health and safety, and workmen's compensation laws are only a few examples." *DeCanas*, 424 U.S., at 356 (emphasis added). With its decision in *Dillingham Construction*, this Court has explicitly added prevailing wage laws to this list. Consequently, the Ohio Supreme Court's decision finding that job targeting is absolutely protected under the NLRA and, therefore, that the state laws invoked by Croson to challenge the job targeting program are preempted, is wrong and in conflict with established authority from this Court and other federal and state courts.

B. Ohio's Imposition Of Minimum Labor Standards Is Not Preempted Under The National Labor Relations Act

Under *Garmon*, this Court has not prohibited regulation of activity touching upon labor-management relations, but simply has provided guidelines regarding the permissible *scope* of "regulation of activity touching upon labor-management relations." *Sears, Roebuck and Co. v. San Diego County Dist. Council of Carpenters*, 436 U.S. 180, 187 (1978). In fact, since *Garmon*, this Court has repeatedly clarified that even where an activity is arguably subject to § 7 or § 8 of the NLRA, the Court "has been unwilling to 'declare pre-empted all local regulation that touches or concerns in any way the complex interrelationships between employees, employers, and unions . . . ' "

Farmer v. United Broth. of Carpenters and Joiners of America, Local 25, 430 U.S. 290, 298 (1977), *quoting Motor Coach Employees v. Lockridge*, 403 U.S. 274, 289 (1971).

The Court's reluctance to extend *Garmon* preemption over local regulation is an acknowledgment that preemption is not to be applied indiscriminately, particularly where the State has a substantial interest in the regulation:

> Our cases indicate . . . that inflexible application of the [*Garmon*] doctrine is to be avoided, *especially where the State has a substantial interest in regulation of the conduct at issue and the State's interest is one that does not threaten undue interference with the federal regulatory scheme.*

Id., 430 U.S., at 302. The Court in *Farmer* found that even where the State regulation results in "a potential for interference with the federal scheme of regulation," preemption is not applicable where the State has a "legitimate and substantial interest" in the regulation. *Id.*, 430 U.S., at 303, 97 S.Ct., at 1065. (NLRA does not preempt an action brought in state court by a union member against the union for intentional infliction of emotional distress).

1. *Garmon* Does Not Preempt The Establishment Of State Or Federal Minimum Labor Standards, Including Ohio's Prevailing Wage Law Or Claims Made Thereunder

One type of local regulation that this Court has vigorously protected from claims of preemption is the exact type of regulation at issue here: minimum labor standards laws. In *Metropolitan Life Ins. Co. v. Massachusetts*, 471 U.S. 724 (1985), the Supreme Court declared that unionized workers and employers are subject to minimum labor standards imposed by both federal and state law (just as non-union workers and employers are subject

to those same standards). *Id.*, 471 U.S., at 755. In *Metropolitan Life Ins. Co.*, the Court considered whether the NLRA preempted a state law requiring that minimum mental health benefits be provided under certain health insurance policies. Just as is argued here, the party trying to escape application of the minimum standard asserted that the right to freely negotiate the terms of their collective bargaining agreement was deprived, and therefore preempted under the NLRA. *Id.* The Court flatly disagreed:

> [T]hese minimum state labor standards affect union and non-union employees equally, and neither encourage nor discourage the collective-bargaining processes that are subject of the NLRA. Nor do they have any but the most indirect effect on the right of self-organization established in the Act.

Id., 471 U.S., at 755. The Court went on to explain that, by their very nature, federal *or* state laws that establish minimum labor standards "are not designed to encourage or discourage employees in the promotion of their interests collectively." *Id.* Instead, these laws are, in part, "designed to give specific minimum protections to *individual* workers and to ensure that *each* employee covered by the Act would receive" nothing less than the mandated benefit. *Id.* (emphasis in original). The Court explained that where the State chooses to establish a minimum labor standard, it simply allows the employee to come to the negotiating table with one protection for which they otherwise might have to bargain – and such state action is in no way preempted by federal law. *Id.*, 471 U.S., at 756-57. ("States possess broad authority under the police powers to regulate the employment relationship to protect workers within the State.") (citation omitted).

Congress has never excluded unionized workers and employers "from laws establishing federal minimum

employment standards," and this Court has explained that "We see no reason to believe that for this purpose Congress intended state minimum labor standards to be treated differently from federal minimum standards." *Metropolitan Life Ins. Co. v. Massachusetts*, 471 U.S. 724, 755 (1985). The reason for this is that, "[t]he evil Congress was addressing [through the NLRA] was entirely unrelated to local or federal regulation establishing minimum terms of employment." *Metropolitan Life Ins. Co. v. Massachusetts*, 471 U.S. 724 (1985).

The Supreme Court's explanation in *Metropolitan Life Ins. Co.* that state minimum labor standards do not intrude impermissibly upon collective bargaining was followed up by *Fort Halifax Packing Co., Inc. v. Coyne*, 482 U.S. 1 (1987). In *Fort Halifax Packing*, the Court again addressed a challenge of NLRA preemption to a minimum labor standard, this one involving a state statute requiring a one-time severance payment to employees in the event of a plant closing. *Fort Halifax Packing*, 482 U.S., at 20. Again, as in the present case, and as in *Metropolitan Life Ins. Co.*, the party seeking to escape the state minimum standard argued that the law unlawfully intruded upon the bargaining activities of the parties because the standard undercut the parties' ability to negotiate on something they otherwise might have to bargain. The Court explained that this has nothing to do with preemption:

> It is true that the Maine statute gives employees something for which they otherwise might have to bargain. That is true, however, with regard to *any* state law that substantively regulates employment conditions. Both employers and employees come to the bargaining table with

> rights under state law that form a 'backdrop' for their negotiations.

Fort Halifax Packing, 482 U.S., at 21 (citation omitted).[7] As a result, assertions such as those made by Respondents in the present case that the state statute pertains to matters over which the parties are free to bargain "cannot support a claim of pre-emption." *Id.*, 482 U.S., at 22. *See Michigan United Food and Commercial Workers Unions v. Baerwaldt*, 767 F.2d 308 (6th Cir., 1984) (state law requiring minimum substance abuse treatment benefits be provided under certain health insurance policies is not preempted under the NLRA or ERISA).

The freedom enjoyed by the states to enforce minimum labor standards is a recognition that "efforts by states to limit the *outcome* of [the collective bargaining] process do not impinge on the jurisdiction of the NLRB to determine what employer and employee conduct the NLRA prohibits or permits." *General Elec. Co. v. New York State Dept. of Labor*, 698 F. Supp. 1093 (S.D.N.Y 1988), vacated on other grounds, 891 F.2d 25 (2d Cir. 1989) (emphasis added). In *General Electric*, the company challenged New York's prevailing wage statute, claiming that the statute was preempted by the NLRA. The District Court rejected General Electric's *Garmon* preemption argument, finding that "*Garmon* is inapplicable since . . . Sections 7 and 8 of the NLRA are not concerned with the substantive *outcome* of the collective bargaining process." *Id.*, 698 F. Supp. at 1096 (emphasis added).

Ohio's prevailing wage law sets a minimum standard that applies to everyone. Union contractors and unions are still free to collectively bargain, however, there are certain outcomes of that bargaining that simply are not

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[7] The Court in *Fort Halifax* expressly considered *Garmon* preemption – and rejected it. *Fort Halifax Packing*, 482 U.S., at 23, note 16.

allowed. The fact of the matter is that "[t]he union parties remain free to deduct as much as they will . . . however, [the contractor] should [not] expect credit toward payment of the prevailing wage under the present Ohio statute." *Subsidizing Contractors to Gain Employment: Construction Union "Job Targeting,"* Northrup and White, 17 *Berkeley Journal of Employment & Labor Law*, 62, 81 (1996). It is incontrovertible that states may set limits on the *outcome* of the collective bargaining process, and that such limits do not impinge upon the National Labor Relations Board. *Id.* At 523. As the Court explained in *Metropolitan Life Ins. Co. v. Massachusetts*, 471 U.S. 724 (1985), the NLRA is not concerned with the "terms of the bargain that is struck" through the collective bargaining process. *Id.*, 471 U.S., at 753.

Ohio's prevailing wage law simply does not prohibit or restrict employers and employees from engaging in collective bargaining or any other activity protected under the NLRA, but only speaks to certain outcomes of that negotiating process. The minimum labor standard expressed through Ohio's prevailing wage law neither encourages nor discourages the collective bargaining process that is the subject of the NLRA. The law applies equally to all employers, union and non-union alike. The law gives specific minimum protections to all individual employees, union and non-union alike. There simply is no basis upon which to argue that a minimum labor standard such as this is preempted under the NLRA. Ohio is in no way regulating union dues, check-off, or bargaining. In fact, the job targeting deductions at issue have repeatedly been ruled to be something other than union dues. *See Reich, Brock,* and *Aubry*. To the contrary, Ohio is simply operating in an area "traditionally subject to local regulation, which Congress could not possibly have intended to eliminate." *Dillingham Construction*, 117 S.Ct., at 842.

2. A Proper Analysis Would Have Used The "Arguably Protected" Standard Under *Garmon*

The Ohio Supreme Court did not apply the correct standard under *Garmon* to the facts in this case. At best, the Ohio Supreme Court should have applied the portion of *Garmon* analysis which asks whether the activity in question is "arguably protected" under Section 7 of the NLRA. Under this analysis, the Ohio Supreme Court could not have avoided the rule of law established in *Sears Roebuck and Co. v. San Diego County Dist. Council of Carpenters*, 436 U.S. 180 (1978) that federal preemption does not occur if the controversy presented to the state is not "identical" to that which could have been presented to the NLRB. The Ohio Supreme Court's holding that it is "not important that J.A. Croson could not have presented the identical controversy to the NLRB" is based upon the utterly unfounded conclusion that job targeting deductions are protected regardless of the impact of such deductions on employee wages. (App. 16-17a).

The problem with the Ohio Supreme Court's analysis is that there is a fundamental lack of understanding of basic NLRB concepts such as "protected activity." Clearly, picketing is protected activity. But simply because picketing is protected activity does not mean that some types of picketing may be illegal and, therefore, not protected. That is in essence the *Sears* case. In *Sears*, the Court analyzed whether the activity of picketing was "arguably protected," and the Court concluded that since the identical issue (trespass) could not be presented to the NLRB, it was not preempted.

In the matter *sub judice*, the concept of deductions from wages is also, like picketing, potentially a "protected activity." However, this does not mean that *all* job targeting programs are absolutely protected regardless of

their requirements or content. However, that is in essence the Ohio Supreme Court's ruling. Under the Ohio Supreme Court's analysis, if tomorrow a union proposed that union employees must give up not 2% but 100% of their money to a job targeting program, the State of Ohio would be powerless to stop this deduction no matter what its local or state minimum labor standards were. Had the Ohio Supreme Court followed the established precedent that job targeting deductions are not absolutely protected, it would have concluded that the state regulations at issue are not preempted because the issue presented to the state court is *not* identical to the controversy that could be presented to the NLRB.

In this case, the issue Petitioner presented to the trial court concerned the permissibility of lowering an employee's pay on a public construction project *below* the minimum labor standard set in the Ohio prevailing wage law. There was no blanket request to ban job targeting programs or even to find that these deductions were illegal on private construction projects. Rather, all that was asked of the Ohio Supreme Court was to let the case go forward to determine if this deduction violated the Ohio prevailing wage law.

3. This Matter Is Not Preempted Under *Garmon* Because The Controversy Presented To The State Court Is Not Identical To That Which Could Have Been Presented To The NLRB

The Ohio Supreme Court recognized that Petitioner "J.A. Croson could not have presented the identical controversy to the NLRB" as was raised in Croson's Complaint (App. 19a). Having found that Petitioner could not have presented the issue to the NLRB, the Supreme Court

of Ohio's decision is in direct conflict with this Court's ruling that a matter is preempted under the NLRA only if the issue is *identical* to the matter that could be ruled upon by the NLRB. *Sears, Roebuck v. San Diego County District Council of Carpenters.*, 436 U.S. 180:

> The critical inquiry . . . is not whether the State is enforcing a law relating specifically to labor relations or one of general application but whether the controversy presented to the state court is *identical to* . . . or different from . . . that which could have been, but was not, presented to the Labor Board. For it is only in the former situation that a state court's exercise of jurisdiction necessarily involves a risk of interference with the unfair labor practice jurisdiction of the Board which the arguably prohibited branch of the Garmon doctrine was designed to avoid.

Sears, 436 U.S., at 197 (emphasis added). In *Sears*, this Court considered whether the NLRA preempted enforcement of state trespass laws against picketing. The Court noted that the primary jurisdiction rationale for preemption only applied when the "aggrieved party has a reasonable opportunity either to invoke the NLRB's jurisdiction itself or to induce his adversary to do so." *Sears* at 201. In other words, where the aggrieved party such as Croson cannot "directly obtain a Board ruling" on the issue it has raised, then *Garmon* preemption does not apply. *Id.*

As the Court of Appeals in this matter appropriately observed, "the controversy [Croson] presents is very different from the controversy [J.A. Guy and Local 189] allege is subject to NLRB jurisdiction." (App. 57a). The Court of Appeals went on to state that Croson is "an outsider to the collective bargaining agreement [and Croson, therefore] has no acceptable means of presenting the dues-deduction issue to the NLRB." (App. 58a). Neither J.A. Guy nor Local 189 has committed an unfair labor

practice against Petitioner. Petitioner has nothing to complain about before the NLRB. Petitioner has nothing to complain about under the NLRA. Petitioner's complaint is that Respondents have undermined a state law requiring that contractors on state contracts pay a certain prevailing wage. Petitioner is not complaining about any activity that invokes the jurisdiction of the NLRB. In fact, the present controversy has nothing to do with the NLRB or its jurisdiction over the NLRA. As explained in "Subsidizing Contractors to Gain Employment: Construction Union 'Job Targeting,' " Northrup & White, 17 *Berkeley Journal of Employment and Labor Law* 62 (1996), the State of Ohio:

> [i]s not attempting to regulate dues check-off. It is not calling into question the underlying collective bargaining agreements. It is not adjudicating a dispute properly before the National Labor Relations Board (NLRB) or interfering in the zone left by Congress to the free play of economic forces. The state is simply attempting to define what counts as payment of prevailing wages for purposes of its own competitive bidding statutes. This is surely a process which is both innocuous and necessary.

Id., at 81. The essence of the issue that Croson seeks to present to the state court concerns whether monetary contributions from union employees to contractors should be considered an impermissible rebate, or at least not counted toward the contractor's obligation to pay the prevailing wage. *Id.* This is in no way identical to matters to be raised before the NLRB. *Id.* at 80-82.

Ohio's regulation has nothing to do with union dues, check-off, or collective bargaining, but, rather, with the enforcement of a minimum labor standard. Ohio certainly can regulate schemes that reduce union (or non-union) employees' compensation below the level that all others are supposed to be paid pursuant to the local prevailing

wage law without impermissibly intruding upon federal law. *See Int'l Broth. of Elec. Workers et al. v. Aubry* (Calif. App., 1996), 41 Cal. App. 4th 1632, 49 Cal. Rptr. 2d 759.

Reliance by the Supreme Court of Ohio upon *Manno Electric, Inc.*, NLRB Case No. 15-CA-11891 (July 20, 1994) (NLRB May 22, 1996), (321 NLRB No. 43, 152 LRRM 1107, 1996 WL 276357) is misplaced. That avenue of analysis inappropriately accepts the status of job targeting as some kind of absolute right and ignores that Ohio's prevailing wage law does not regulate dues check-off, does not call into question the underlying collective bargaining agreement, and does not concern a dispute properly before the NLRB. Because the matter in controversy is not an identical issue which can be presented to the state and the NLRB, and the Ohio Supreme Court has recognized the matter as such, there can be no federal preemption.

CONCLUSION

Ohio's effort to establish and enforce minimum labor standards through its prevailing wage law is not preempted by federal law. Under the modern analysis of labor law preemption, this Court has clarified time and time again that the States may establish and enforce minimum labor standards without impermissibly entangling with federal law. Not only has this Court ruled that a state prevailing wage law is not preempted under federal labor law, but several state and federal courts have reached precisely the same conclusion in a variety of contexts involving job targeting deductions.

Not only is Ohio's prevailing wage law a permissible exercise of the state's power to enforce minimum labor standards, but the dispute at issue in this matter is not identical to that which could have been presented to the NLRB, and Petitioner has no reasonable opportunity to invoke the jurisdiction of the NLRB. Ohio's prevailing

wage law, and the claims made thereunder, simply are not preempted.

For the foregoing reasons, this Court should grant Petitioner J.A. Croson Company's petition for a writ of certiorari.

Respectfully submitted,

RONALD L. MASON*
THOMAS M.L. METZGER
PATRICK M. O'NEILL
KEGLER, BROWN, HILL & RITTER
65 East State Street, Suite 1800
Columbus, Ohio 43215
(614) 462-5400
Counsel for Petitioner
**Counsel of Record*

APPENDIX A

J.A. CROSON COMPANY, Appellee,

v.

J.A. GUY, INC. et al., Appellants.

Nos. 96-2578, 97-14.

Supreme Court of Ohio.

Submitted Jan. 13, 1998.

Decided April 8, 1998.

Syllabus by the Court

Section 7 of the National Labor Relations Act preempts state regulation under Ohio Adm.Code 4101:9-4-07(B)(6) and R.C. 4115.10(D) to the extent that those provisions could be construed to restrain or inhibit the federally protected use of job targeting programs.

This action arises out of a claim by J.A. Croson Company ("J.A. Croson") that the successful bidder on two public improvement projects, J.A. Guy, Inc. ("J.A. Guy"), violated Ohio prevailing wage law by cooperating with the United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada, Local 189 ("Local 189") with respect to a "job targeting" program.

J.A. Guy placed successful bids on two public improvement projects, one involving plumbing for a new jail in Pickaway County and the other, following completion of the jail project, involving construction of a water softening system for the jail. Before submitting its bid on the jail project, J.A. Guy made a request to Local 189 that

the union "target" the jail project by permitting any successful bidder on the project that was also a signatory to a collective bargaining agreement with Local 189 to participate in the Plumbers and Pipe Fitters Local 189 Industry Advancement Program ("Industry Advancement Program"). Local 189 agreed to target the jail project and informed union contractors bidding on the project that, under its Industry Advancement Program, it would pay the successful bidder a $9 grant per man-hour worked by Local 189 members on the project. J.A. Guy calculated its bid accordingly and submitted the lowest bid on the jail project.

Following completion of the jail project, it became necessary to install a water softening system. J.A. Guy bid on and received the construction contract for the water softening project. Local 189 did not target the water softening project and, consequently, did not pay J.A. Guy any funds under its Industry Advancement Program for the project.

Pursuant to R.C. 4115.16(B), J.A. Croson, an unsuccessful bidder on both the jail project and the water softening project, filed a complaint in common pleas court alleging that J.A. Guy had violated Ohio's prevailing wage law. Specifically, the complaint alleged that J.A. Guy made a "special assessment" prohibited by Ohio Adm.Code 4101:9-4-07(B)(6) when it withheld two percent of employee gross earnings on both the jail and water softening projects for placement in the Industry Advancement Program Fund under the dues checkoff clause of its collective bargaining agreement with Local 189. Additionally, as the issues developed, J.A. Croson

argued that J.A. Guy had violated the antikickback provision of Ohio's prevailing wage law (R.C. 4115.10[D]) by receiving job targeting grants from the union.

J.A. Guy made Local 189 a third-party defendant to the action, asserting that all employee wage deductions under the collective bargaining agreement were remitted to Local 189 and, therefore, any use of those sums in violation of the prevailing wage law was caused by the union's acts or omissions. J.A. Guy, Local 189, and J.A. Croson all moved for summary judgment on the basis of their respective claims and defenses.

The trial court concluded that, pursuant to *San Diego Bldg. Trades Council v. Garmon* (1959), 359 U.S. 236, 79 S.Ct. 773, 3 L.Ed.2d 775, federal law preempted J.A. Croson's state claims and granted summary judgment in favor of J.A. Guy and Local 189. On appeal, the Pickaway County Court of Appeals reversed the trial court decision, holding federal preemption inapplicable.

The Pickaway County Court of Appeals certified to this court a conflict between its judgment and the judgments of the Hamilton and Madison County Courts of Appeals in *Indep. Electrical Contrs. of Greater Cincinnati, Inc. v. Hamilton Cty. Div. of Pub. Works* (1995), 101 Ohio App.3d 580, 656 N.E.2d 18, and *J.A. Croson Co. v. Cent. Ohio Joint Vocational School Dist.* (1995), 104 Ohio App.3d 146, 661 N.E.2d 250. Upon consideration of the certified issue and contemporaneous discretionary appeals filed by J.A. Guy and Local 189, we determined that a conflict exists, accepted the discretionary appeals, and directed the parties to brief the following issue:

"Whether federal labor law preempts a claim that a union employer's deduction of union dues for a union 'Industry Advancement' or 'job targeting' fund violates Ohio's Prevailing Wage Law, R.C. 4115.01 et seq., and state regulations adopted thereunder."

The cause is now before this court for consideration of the discretionary appeals and resolution of the certified conflict.

Kegler, Brown, Hill & Ritter, Ronald L. Mason and Thomas M.L. Metzger, Columbus, for appellee.

Schottenstein, Zox & Dunn, Felix C. Wade and Edwin L. Skeens, Columbus, for appellant J.A. Guy, Inc.

Benesch, Friedlander, Coplan & Aronoff, L.L.P., N. Victor Goodman, Mark D. Tucker and Rex A. Littrell, Columbus, for appellant Local 189.

Betty D. Montgomery, Attorney General, Michael D. Allen and Daniel P. Jones, Assistant Attorneys General, urging affirmance for amicus curiae, Ohio Bureau of Employment Services.

Venable, Baetjer, Howard & Civiletti, L.L.P., Maurice Baskin and Paul A. Debolt, Washington, DC, urging affirmance for amicus curiae, Associated Builders and Contractors, Inc.

Sherman, Dunn, Cohen, Leifer & Yellig, P.C., Terry R. Yellig and Jonathan D. Newman, Washington, DC, urging reversal for amicus curiae, the Building and Construction Trades Department, AFL-CIO, and the Ohio State Building and Construction Trades Council, AFL-CIO.

Schmeltzer, Aptaker & Shepard, P.C., Robert L. Duston and Gary L. Lieber, Washington, DC, urging reversal for amicus curiae, National Electrical Contractors Association and National Electrical Contractors Association, Ohio Conference.

Bricker & Eckler and Luther L. Liggett, Jr., Columbus, urging reversal for amicus curiae, Ohio Mechanical Contracting Industry.

COOK, Justice.

JOB TARGETING

The legal dispute in this case centers on Local 189's use of a job targeting program. Job targeting is a strategy employed nationwide by construction unions, with the cooperation of unionized contractors, in response to declining union membership and the expanding market penetration of nonunion construction. *See* Northup & White, Subsidizing Contractors to Gain Employment; Construction Union "Job Targeting" (1996), 17 Berkeley J. Employment & Labor L. 62. The aim of job targeting programs is clear: unions want union contractors to bid successfully on construction projects so that the jobs created by those projects will go to union members. Typically, unions carry out their job targeting programs by selecting projects to target and guaranteeing subsidies to union contractors that submit successful bids. The result is to lower union contractors' overall costs required to complete targeted projects, enabling union contractors to submit competitive bids.

Local 189 carries on job targeting through its Industry Advancement Program. The union pays its grants to unionized contractors on targeted jobs from a fund specifically created for the program. The fund is maintained through union members' voluntary contributions, which are deducted from employee gross earnings at a rate of two percent and remitted to Local 189 pursuant to the dues checkoff clause of the union's collective bargaining agreements with its unionized contractors. The collective bargaining agreements label the two percent deduction as a "Market Recovery Assessment" and state that the assessment is additional to the 1¾ percent deduction for regular checkoff dues. The Market Recovery Assessment is subject to the periodic approval of union members.

Accordingly, whether working on a targeted job or not, Local 189 union members have two percent of their gross earnings deducted and remitted to the union for placement in the Industry Advancement Program fund. The union chooses which jobs to target. A unionized contractor may request that the union target a particular job, but the ultimate decision of whether to target a job and how much to pay in grants is made by Local 189 officials.

OHIO'S PREVAILING WAGE LAW

The prevailing wage statutes, R.C. 4115.03 through R.C. 4115.16, require contractors and subcontractors for public improvement projects to pay laborers and mechanics the so-called prevailing wage in the locality where the project is to be performed. "[T]he primary purpose of the prevailing wage law is to support the

integrity of the collective bargaining process by preventing the undercutting of employee wages in the private construction sector." (Plurality opinion.) *State ex rel. Evans v. Moore* (1982), 69 Ohio St.2d 88, 91, 23 O.O.3d [sic] 145, 147, 431 N.E.2d 311, 313.

Two prevailing wage provisions are at issue. The first is Ohio Adm.Code 4101:9-4-07, a regulation that was adopted by the Administrator of the Bureau of Employment Services pursuant to R.C. 4115.12. Ohio Adm.Code 4101:9-4-07(B)(6) makes it a violation of R.C. 4115.07 to deduct union fines or special assessments from employee wages.[1] J.A. Croson seeks to demonstrate that the Market Recovery Assessment withheld by J.A. Guy from its employees' wages pursuant to its collective bargaining agreement with Local 189 is prohibited as a special assessment under the regulation. Also under J.A. Croson's theory, J.A. Guy's deduction of the Market Recovery Assessment reduces employee wages below the prevailing wage, constituting a violation of the prevailing wage law.

The second provision at issue is R.C. 4115.10(D), which prohibits any person from demanding, requesting,

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[1] Ohio Adm.Code 4101:9-4-07(B)(6) states: "(B) The following deductions from wages may be made only if, prior to commencement of work by the employee on any project, employers procure and maintain, in writing, proof of voluntary deductions signed by the employee:" * * * "(6) Any deductions to pay regular union initiation fees and membership dues, not including fines or special assessments, provided that a collective bargaining agreement between the employer and representatives of its employees permits such deductions and such deductions are not otherwise prohibited by law."

or receiving any part of a worker's wages upon the statement, representation, or understanding that failure to comply with such demand or request will prevent the worker from procuring or retaining employment.[2] The statute contains an exception for any agent or representative of a labor organization acting in the collection of dues or assessments of that organization. J.A. Croson seeks to demonstrate that J.A. Guy's receipt of job targeting funds violates R.C. 4115.10(D).

PREEMPTION UNDER THE NLRA

In any case concerning preemption, congressional purpose must be the ultimate focus. *Malone v. White Motor Corp.* (1978), 435 U.S. 497, 504, 98 S.Ct. 1185, 1189-1190, 55 L.Ed.2d 443, 450. The National Labor Relations Act

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[2] R.C. 4115.10(D) provides:

"Where persons are employed and their rate of wages has been determined as provided in section 4115.04 of the Revised Code, no person, either for self or any other person, shall request, demand, or receive, either before or after the person is engaged, that the person so engaged pay back, return, donate, contribute, or give any part or all of the person's wages, salary, or thing of value, to any person, upon the statement, representation, or understanding that failure to comply with such request or demand will prevent the procuring or retaining of employment, and no person shall, directly or indirectly, aid, request, or authorize any other person to violate this section. This division does not apply to any agent or representative of a duly constituted labor organization acting in the collection of dues or assessments of such organization."

("NLRA") contains no express preemption provision. "Where the pre-emptive effect of federal enactments is not explicit, 'courts sustain a local regulation "unless it conflicts with federal law or would frustrate the federal scheme, or unless the courts discern from the totality of the circumstances that Congress sought to occupy the field to the exclusion of the States." ' " *Metro. Life Ins. Co. v. Massachusetts* (1985), 471 U.S. 724, 747-748, 105 S.Ct. 2380, 2393, 85 L.Ed.2d 728, 745, quoting *Allis-Chalmers Corp. v. Lueck* (1985), 471 U.S. 202, 209, 105 S.Ct. 1904, 1910, 85 L.Ed.2d 206, 213-214. In determining whether state regulation should yield to subordinating federal authority, the United States Supreme Court has been concerned with potential conflict regarding substantive law, remedies, and administration. The potential for conflict arises when two law-enforcing authorities, with the disharmonies inherent in two systems, one federal the other state, are required to apply inconsistent standards of substantive law and/or differing remedial schemes. *Garmon*, 359 U.S. at 241-242, 79 S.Ct. at 778, 3 L.Ed.2d at 781.

The Supreme Court articulated two distinct NLRA preemption principles in *Metro. Life, supra*. "The first, 'Garmon pre-emption,' *see San Diego Building Trades Council v. Garmon, supra*, forbids state and local regulation of activities that are 'protected by § 7 of the [NLRA], or constitute an unfair labor practice under § 8.' [Garmon] 359 U.S. at 244 [79 S.Ct. at 779, 3 L.Ed.2d at 782]. *See also Garner v. Teamsters*, 346 U.S. 485, 498-499 [74 S.Ct. 161, 170, 98 L.Ed. 228, 244] (1953) ('[W]hen two separate remedies are brought to bear on the same activity, a conflict is imminent'). Garmon pre-emption prohibits regulation even of activities that the NLRA only arguably

protects or prohibits. *See Wisconsin Dept. of Industry v. Gould, Inc.*, 475 U.S. 282, 286 [106 S.Ct. 1057, 1061, 89 L.Ed.2d 223, 228] (1986). This rule of pre-emption is designed to prevent conflict between, on the one hand, state and local regulation and, on the other, Congress' 'integrated scheme of regulation,' *Garmon*, 359 U.S., at 247 [79 S.Ct. at 781, 3 L.Ed.2d at 784], embodied in §§ 7 and 8 of the NLRA, which includes the choice of the NLRB, rather than state or federal courts, as the appropriate body to implement the Act." (Emphasis sic.) *Bldg. & Constr. Trades Council of Metro. Dist. v. Associated Builders & Contractors of Massachusetts/Rhode Island, Inc.* (1993), 507 U.S. 218, 224-225, 113 S.Ct. 1190, 1194-1195, 122 L.Ed.2d 565, 574, *citing Metro. Life*, 471 U.S. at 748-749, 105 S.Ct. at 2393-2394, 85 L.Ed.2d at 745-746, and fn. 26.

"A second pre-emption principle, 'Machinists pre-emption,' *see Machinists v. Wisconsin Employment Relations Comm'n* [1976], 427 U.S. [132] at 147 [96 S.Ct. 2548, 2556, 49 L.Ed.2d 396, 407] prohibits state and municipal regulation of areas that have been left ' "to be controlled by the free play of economic forces." ' *Id.*, at 140 [96 S.Ct. at 2553, 49 L.Ed.2d at 403] (citation omitted). *See also Golden State Transit Corp. v. Los Angeles*, 475 U.S. 608, 614 [106 S.Ct. 1395, 1398, 89 L.Ed.2d 616, 623] (1986) (*Golden State I*); *Golden State Transit Corp. v. Los Angeles*, 493 U.S. 103, 111 [110 S.Ct. 444, 451, 107 L.Ed.2d 420, 431] (1989) (*Golden State II*). Machinists pre-emption preserves Congress' 'intentional balance " 'between the uncontrolled power of management and labor to further their respective interests.' " ' *Golden State I*, 475 U.S., at 614 [106 S.Ct. at 1399, 89 L.Ed.2d at 623-624] (citations omitted)." *Bldg. & Constr.*

Trades Council of Metro. Dist., 507 U.S. at 225-226, 113 S.Ct. at 1195, 122 L.Ed.2d at 575.

GARMON PREEMPTION

"In *San Diego Building Trades Council v. Garmon*, 359 U.S. 236 [79 S.Ct. 773, 3 L.Ed.2d 775], the Court made two statements which have come to be accepted as the general guidelines for deciphering the unexpressed intent of Congress regarding the permissible scope of state regulation of activity touching upon labor-management relations." *Sears, Roebuck & Co. v. San Diego Cty. Dist. Council of Carpenters* (1978), 436 U.S. 180, 187, 98 S.Ct. 1745, 1752, 56 L.Ed.2d 209, 219. The first statement relates to activity which is clearly protected or prohibited by the federal statute. The second articulated a more sweeping prophylactic rule concerning activity that is only arguably subject to the protections found in Section 7 or the prohibitions found in Section 8 of the NLRA. *Id.*

CLEARLY PROTECTED OR CLEARLY PROHIBITED ACTIVITY

"When it is clear or may fairly be assumed that the activities which a State purports to regulate are protected by § 7 of the National Labor Relations Act, or constitute an unfair labor practice under § 8, due regard for the federal enactment requires that state jurisdiction must yield. To leave the States free to regulate conduct so plainly within the central aim of federal regulation involves too great a danger of conflict between power asserted by Congress and requirements imposed by state law. * * * Regardless of the mode adopted, to allow the

States to control conduct which is the subject of national regulation would create potential frustration of national purposes." *Garmon*, 359 U.S. at 244, 79 S.Ct. at 779, 3 L.Ed.2d at 782-783.

Accordingly, if the National Labor Relations Board ("NLRB") has decided, subject to appropriate federal judicial review, that conduct is either protected by Section 7 or prohibited by Section 8, the matter is at an end and states are ousted of all jurisdiction. *Id.* at 245, 79 S.Ct. at 780, 3 L.Ed.2d at 783.

ARGUABLY PROHIBITED OR PROTECTED ACTIVITY

Where conduct only arguably falls under the protections of Section 7 or the prohibitions of Section 8 of the NLRA, and the NLRB has not yet passed on whether the conduct is actually protected or prohibited, and it may not be fairly assumed that the NLRB would adjudge the conduct to be neither protected nor prohibited, courts generally must refrain from adjudicating the issue. *Id.* at 244, 79 S.Ct. at 779, 3 L.Ed.2d at 783. "It is essential to the administration of the Act that these determinations be left in the first instance to the NLRB." *Id.* at 244-245, 79 S.Ct. at 779, 3 L.Ed.2d at 783. Accordingly, the Supreme Court has established the doctrine of primary jurisdiction to safeguard Congress's design to "entrust administration of the labor policy for the Nation to a centralized administrative agency [the NLRB]." *Gould*, 475 U.S. at 289-290, 106 S.Ct. at 1063, 89 L.Ed.2d at 230.

In enacting the NLRA,

> " 'Congress did not merely lay down a substantive rule of law to be enforced by any tribunal

competent to apply law generally to the parties. It went on to confide primary interpretation and application of its rules to a specific and specially constituted tribunal and prescribed a particular procedure for investigation, complaint and notice, and hearing and decision, including judicial relief pending a final administrative order. Congress evidently considered that centralized administration of specially designed procedures was necessary to obtain uniform application of its substantive rules and to avoid these diversities and conflicts likely to result from a variety of local procedures and attitudes towards labor controversies. * * * A multiplicity of tribunals and a diversity of procedures are quite as apt to produce incompatible or conflicting adjudications as are different rules of substantive law.' " *Garmon*, 359 U.S. at 242-243, 79 S.Ct. at 778, 3 L.Ed.2d at 781-782, quoting *Garner*, 346 U.S. at 490-491, 74 S.Ct. at 165-166, 98 L.Ed. at 239-240.

PROHIBITED CONDUCT VERSUS PROTECTED CONDUCT

Regardless of whether conduct is clearly or only arguably subject to NLRA regulation, different concerns arise depending on whether the conduct may be said to be protected or prohibited. When conduct is prohibited, state regulation concerning the same issue may not necessarily come into direct conflict with the overt policy of the federal prohibition. Nevertheless, "the Garmon rule prevents States not only from setting forth standards of conduct inconsistent with the substantive requirements of the NLRA, but also from providing their own regulatory or judicial remedies for conduct prohibited or arguably

prohibited by the Act. *See [Garmon]* 359 U.S., at 247 [79 S.Ct. at 780-781, 3 L.Ed.2d at 787]. The rule is designed to prevent 'conflict in its broadest sense' with the 'complex and interrelated federal scheme of law, remedy and administration,' *id.*, at 243 [79 S.Ct. at 778, 3 L.Ed.2d at 782] and [the Supreme] Court has recognized that '[c]onflict in technique can be fully as disruptive to the system Congress erected as conflict in overt policy.' " *Gould*, 475 U.S. at 286, 106 S.Ct. at 1061, 89 L.Ed.2d at 228, quoting *Amalgamated Assn. of Street, Elec. Ry. & Motor Coach Employees of Am. v. Lockridge* (1971), 403 U.S. 274, 287, 91 S.Ct. 1909, 1918, 29 L.Ed.2d 473, 483. With respect to activity prohibited under Section 8 of the NLRA, the court has carefully noted that " 'the range and nature of those remedies that are and are not available is a fundamental part' of the comprehensive system established by Congress." *Gould*, 475 U.S. at 287, 106 S.Ct. at 1061, 89 L.Ed.2d at 228, quoting *Lockridge*, 403 U.S. at 287, 91 S.Ct. at 1918, 29 L.Ed.2d at 483.

"Apart from notions of 'primary jurisdiction,' there would be no objection to state courts' and the NLRB's exercising concurrent jurisdiction over conduct prohibited by the federal Act." (Emphasis added and footnote omitted.) *Sears*, 436 U.S. at 199-200, 98 S.Ct. at 1758-1759, 56 L.Ed.2d at 226-227. Considerations of federal supremacy, however, are implicated to a greater extent where conduct is protected under Section 7 of the NLRA. *Id.* Where conduct is protected, "[t]he danger of permitting local adjudications is not that timing or form of relief might be different from what the Board would administer, but rather that the local court might restrain conduct that is in fact protected by the Act." *Sears*, 436 U.S. at 221,

98 S.Ct. at 1770, 56 L.Ed.2d at 240. (Brennan, J., dissenting.) The court has "frequently applied traditional pre-emption principles to find state law barred on the basis of an actual conflict with § 7. If employee conduct is protected under § 7, then state law which interferes with the exercise of these federally protected rights creates an actual conflict and is pre-empted by direct operation of the Supremacy Clause." *Brown v. Hotel & Restaurant Employees & Bartenders Internatl. Union Local 54* (1984), 468 U.S. 491, 501, 104 S.Ct. 3179, 3185, 82 L.Ed.2d 373, 383.

Where state regulation would, in fact, inhibit federally protected activity, there is no need to invoke the primary-jurisdiction rationale set forth in *Garmon*. "The threshold question in every labor pre-emption case is whether the conduct with respect to which a State has sought to act is, or may fairly be regarded as, federally protected activity. Because conflict is the touchstone of pre-emption, such activity is obviously beyond the reach of all state power." *Garmon*, 359 U.S. at 250, 79 S.Ct. at 783, 3 L.Ed.2d at 786. (Harlan, J., concurring.) Accordingly, we must heed the court's caveat in *Brotherhood of RR. Trainmen v. Jacksonville Terminal Co.* (1969), 394 U.S. 369, 383, 89 S.Ct. 1109, 1118, 22 L.Ed.2d 344, 357, fn. 19, that "care must be taken to distinguish pre-emption based on federal protection of the conduct in question from that based predominantly on the primary jurisdiction of the National Labor Relations Board, although the two are often not easily separable." (Citations omitted.)

THE NLRB HAS HELD THAT JOB TARGETING IS PROTECTED CONDUCT UNDER SECTION 7 OF THE NLRA

In *Manno Elec., Inc.* (1996), 321 N.L.R.B. 278, 152 L.R.R.M. 1107, 1996 WL 276357, the NLRB adopted the following administrative law judge's ruling:

> "Section 7 provides that employees shall have the right 'to engage in other concerted activities for the purpose of . . . other mutual aid and protection.' The objectives of the 'job targeting program' are to protect employee's jobs and wage scales. These objectives are protected by section 7." 321 N.L.R.B. at 298.

This ruling elucidates the conflict between the NLRA and the Ohio regulations as J.A. Croson seeks to have them enforced. Whether characterized as an impermissible wage reduction or an illegal subsidy to union contractors, the prohibitions that J.A. Croson seeks to enforce under Ohio law cannot peacefully coexist with the board's classification of job targeting as "concerted activity" protected by Section 7 of the NLRA. Distilled to their elemental purpose, J.A. Croson's claims seek to invoke Ohio law to thwart Local 189's use of its job targeting program. Preemption analysis turns on the real effect of state policy on federal rights. *Livadas v. Bradshaw* (1994), 512 U.S. 107, 119, 114 S.Ct. 2068, 2076, 129 L.Ed.2d 93, 107. "Controlling and therefore superseding federal power cannot be curtailed by the State even though the ground of intervention be different than that on which federal supremacy has been exercised." *Weber v. Anheuser-Busch, Inc.* (1955), 348 U.S. 468, 480, 75 S.Ct. 480, 487-488, 99 L.Ed. 546, 557.

Because the NLRB has held that job targeting is actually protected by the NLRA, there is no room for state regulation infringing that conduct. J.A. Croson's assertion that Manno is distinguishable because it did not involve a challenge brought under a state's prevailing wage law is not persuasive. *See Associated Builders & Contractors, Inc.* (July 1, 1997), 1997 NLRB LEXIS 535. Nothing in the *Manno* decision indicates that the NLRB would limit the NLRA's protection of job targeting to the facts of the case before it.

EXCEPTIONS TO THE GARMON DOCTRINE

The Supreme Court has refused "to apply the preemption doctrine to activity that otherwise would fall within the scope of *Garmon* if that activity 'was a merely peripheral concern of the [Act] [or] touched interests so deeply rooted in local feeling and responsibility that, in the absence of compelling congressional direction, [courts] could not infer that Congress had deprived States of all power to act.' " *Farmer v. United Bhd. of Carpenters & Joiners of Am., Local 25* (1977), 430 U.S. 290, 296-297, 97 S.Ct. 1056, 1061, 51 L.Ed.2d 338, 348, quoting *Garmon*, 359 U.S. at 243-244, 79 S.Ct. at 779, 3 L.Ed.2d at 782.

In *Farmer*, the court concluded that Garmon did not preempt the plaintiff's state court action against his union and its officials alleging intentional infliction of emotional distress, despite that the facts alleged, if true, would also constitute a Section 8 violation. *Id.* at 303, 97 S.Ct. at 1065, 51 L.Ed.2d at 352. The court emphasized, however, that in each case where it has recognized an exception to Garmon preemption, the conduct underlying

the action pending in state court was not protected by the Act. *Id.* at 298-302, 97 S.Ct. at 1062-1064, 51 L.Ed.2d at 348-351. In *Sears, supra,* the court held that California state courts could properly entertain a cause of action against union members in trespass, despite the possibility that their picketing activity was protected by Section 7 of the NLRA. Prior to granting any relief for the trespass, however, the court noted the state court would have to decide that the trespass was not actually protected by federal law. *Id.*, 436 U.S. at 201, 98 S.Ct. at 1759, 56 L.Ed.2d at 227-228.

Preemption exceptions based on local interests are, in fact, inapplicable where state regulation would restrain or inhibit activity that is actually protected by Section 7 of the NLRA. This distinction is necessary due to the differing rationales that underlie preemption based on actual federal protection of the conduct at issue and that which is based on the primary jurisdiction of the NLRB.

"In the latter situation, a presumption of federal pre-emption applies even when the state law regulates conduct only arguably protected by federal law. Such a pre-emption rule avoids the potential for jurisdictional conflict between state courts or agencies and the NLRB by ensuring that primary responsibility for interpreting and applying this body of labor law remains with the NLRB. This presumption of federal pre-emption, based on the primary jurisdiction rationale, properly admits to exception when unusually 'deeply rooted' local interests are at stake. In such cases, appropriate consideration for the vitality of our federal system and for a rational allocation of functions belies any easy inference that Congress intended to deprive the States of their ability to retain

jurisdiction over such matters. [The Supreme Court], therefore, [has] refrained from finding that the NLRA pre-empts state court jurisdiction over state breach of contract actions by strike replacements, state trespass actions, or state tort remedies for intentional infliction of emotional distress.

"If the state law regulates conduct that is actually protected by federal law, however, pre-emption follows not as a matter of protecting primary jurisdiction, but as a matter of substantive right. Where, as here, the issue is one of an asserted substantive conflict with a federal enactment, then '[t]he relative importance to the State of its own law is not material . . . for the Framers of our Constitution provided that the federal law must prevail.' *Free v. Bland*, 369 U.S. 663, 666 [82 S.Ct. 1089, 1092, 8 L.Ed.2d 180, 183] (1962)." (Citations omitted.) *Brown*, 468 U.S. at 502-503, 104 S.Ct. at 3186, 82 L.Ed.2d at 384.

Because job targeting is actually protected under Section 7 of the NLRA, the above exceptions are inapplicable. Accordingly, it is not important that J.A. Croson could not have presented the identical controversy to the NLRB. That inquiry is important only when it is the primary-jurisdiction rationale of Garmon that favors pre-emption. *See Sears*, 436 U.S. at 202, 98 S.Ct. at 1760, 56 L.Ed.2d at 228.

MACHINISTS PREEMPTION

J.A. Croson and the court below rely heavily on the following Supreme Court reasoning as a basis to avoid preemption:

"The NLRA is concerned primarily with establishing an equitable process for determining terms and conditions of employment, and not with particular substantive terms of the bargain that is struck when the parties are negotiating from relatively equal positions. The NLRA's declared purpose is to remedy '[t]he inequality of bargaining power between employees who do not possess full freedom of association or actual liberty of contract, and employers who are organized in the corporate or other forms of ownership association.' § 1, 29 U.S.C. § 151. The same section notes the desirability of 'restoring equality of bargaining power,' among other ways, 'by encouraging the practice and procedure of collective bargaining and by protecting the exercise by workers of full freedom of association, self-organization, and designation of representatives of their own choosing, for the purpose of negotiating the terms and conditions of their employment or other mutual aid or protection.'

" * * *

"It would further few of the purposes of the Act to allow unions and employers to bargain for terms of employment that state law forbids employers to establish unilaterally. 'Such a rule of law would delegate to unions and unionized employers the power to exempt themselves from whatever state labor standards they disfavored.' *Allis-Chalmers Corp. v. Lueck* [471 U.S.] at 212 [105 S.Ct. at 1911-1912, 85 L.Ed.2d at 216]. It would turn the policy that animated the Wagner Act on its head to understand it to have penalized workers who have chosen to join a union by preventing them from benefiting from

> state labor regulations imposing minimal standards on nonunion employers." (Citations omitted.) *Metro. Life*, 471 U.S. at 753-756, 105 S.Ct. at 2396-2397, 85 L.Ed.2d at 749-750.

According to J.A. Croson, "Ohio's prevailing wage law simply does not prohibit or restrict employers and employees from engaging in collective bargaining or any other activity protected under the NLRA, but only speaks to certain outcomes of that negotiating process." Therefore, argues J.A. Croson, the law is not preempted. J.A. Croson characterizes Ohio's prevailing wage law as a minimum standard of employment and argues that it acts as a backdrop for negotiation, creating no interference with the negotiating process.

The problem with J.A. Croson's analysis is that the above Supreme Court language is pertinent only with respect to Machinists preemption. As previously discussed, Machinists preemption does not pertain to conduct that is either arguably or clearly protected or prohibited under Section 7 or 8 of the NLRA. Instead, it involves a range of activity that is not expressly regulated under the NLRA, but that Congress has intentionally left to be controlled by the free play of economic forces.

Collective bargaining is an area that Congress left largely to be controlled by the free play of economic forces. Nevertheless, the Supreme Court has held in cases such as *Metro. Life, supra,* and *Fort Halifax Packing Co.; Inc. v. Coyne* (1987), 482 U.S. 1, 107 S.Ct. 2211, 96 L.Ed.2d 1, that state laws establishing minimum wages and benefits, and presumably prevailing wage laws, generally do not conflict with the NLRA policy to promote equitable collective bargaining. These cases, however, do not extend to

aspects of state regulation directly impinging on the federally protected right of union employees to engage in concerted activity. The concern here is not that state regulation will undermine the collective bargaining process; it is that state regulation will restrain union members from exercising a federally protected right. Accordingly, the cases upon which J.A. Croson relies that explore the nuances of Machinists preemption are of limited value to our inquiry.

CONCLUSION

In light of the NLRB's holding in *Manno*, Section 7 of the NLRA preempts state regulation under Ohio Adm.Code 4101:9-4-07(B)(6) and R.C. 4115.10(D) to the extent that those provisions could be construed to restrain or inhibit the federally protected use of job targeting programs.[3] Accordingly, we reverse the judgment of the appellate court.

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[3] We reject the appellate court's conclusion that any conflict between the state and federal regulations can be avoided by requiring the employer to adjust gross wages so that, after deduction of the Market Recovery Assessment, union employees will still receive the prevailing wage. Aside from the practical difficulties inherent in the suggestion, such a requirement would seriously hinder the effectiveness of job targeting programs and, in many instances, disadvantage union contractors in bidding on public improvement projects. We need not look beyond this case to find an example. Under the appellate court's theory, J.A. Guy would have been required to increase employee gross wages by two percent on the water softening system project to meet the prevailing wage law, despite the fact that J.A. Guy received no job targeting subsidies. Accordingly, because of the Market Recovery Assessment, J.A. Guy would have started with a fixed labor cost

Judgment reversed.

MOYER, C.J., and DOUGLAS, RESNICK, FRANCIS E. SWEENEY, Sr., PFEIFER and LUNDBERG STRATTON, JJ., concur.

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two percent above the prevailing wage requirement. This would have seriously hampered J.A. Guy in submitting a competitive bid. The same scenario would be played out in the vast majority of public improvement projects where the union contractor is unable to secure job targeting funds. Moreover, even where job targeting funds are available, the appellate court's suggestion would largely offset their intended benefit.

APPENDIX B

IN THE COURT OF APPEALS OF OHIO
FOURTH APPELLATE DISTRICT
PICKAWAY COUNTY

J.A. CROSON COMPANY,	:	
Plaintiff-Appellant,	:	Case No. 95 CA 10
vs.	:	
J.A. GUY, INC.,	:	
Defendant-Appellee.	:	**DECISION AND JUDGMENT ENTRY**
	:	(Filed October 4, 1996)
	:	

APPEARANCES:

COUNSEL FOR APPELLANT:	Ronald L. Mason, Thomas M.L. Metzger & Timothy T. Tullis, Emens, Kegler, Brown, Hill & Ritter, L.P.A., 65 East State Street, Suite 1800, Columbus, Ohio 43215
COUNSEL FOR APPELLEE J.A. GUY, INC.:	Felix C. Wade & Edwin L. Skeens, Schottenstein, Zox & Dunn, L.P.A., 41 South High Street, Columbus, Ohio 43215
COUNSEL FOR APPELLEE LOCAL 189:[1]	N. Victor Goodman, Orla E. Collier, Mark D. Tucker & Rex A. Littrell, Benesch, Friedlander, Coplan & Aronoff, 88 East Broad Street, Suite 900, Columbus, Ohio 43215-3506

[1] The full name of this appellee is United Association of Journeymen and Apprentices of the Plumbing and Pipe Fitting Industry of the United States and Canada, Local No. 189.

ABELE, P.J.

This is an appeal from a judgment entered by the Pickaway County Common Pleas Court denying the motion for summary judgment filed by J.A. Croson Company, plaintiff below and appellant herein, and granting the motions for summary judgment filed by J.A. Guy, Inc. and the United Association of Journeymen and Apprentices of the Plumbing and Pipe Fitting Industry of the United States and Canada, Local No. 189, defendants below and appellees herein.

Appellant assigns the following errors:

FIRST ASSIGNMENT OF ERROR:

"THE TRIAL COURT ERRED IN GRANTING APPELLEES J.A. GUY, INC.'S AND LOCAL 189'S MOTIONS FOR SUMMARY JUDGMENT."

SECOND ASSIGNMENT OF ERROR:

"THE TRIAL COURT ERRED IN OVERRULING APPELLANT J.A. CROSON COMPANY'S CROSS-MOTION FOR SUMMARY JUDGMENT."

THIRD ASSIGNMENT OF ERROR:

"THE TRIAL COURT ERRED IN FAILING TO DETERMINE THAT THE JOB TARGETING DEDUCTION TAKEN FROM EMPLOYEES' WAGES BY APPELLEE J.A. GUY, INC. IS A SPECIAL 'ASSESSMENT' PROHIBITED UNDER O.A.C. SECTION 4101:9-4-07."

FOURTH ASSIGNMENT OF ERROR:

"THE TRIAL COURT ERRED IN FAILING TO DETERMINE THAT APPELLEE J.A. GUY, INC. VIOLATED R.C. SECTION 4115.10(D)"

FIFTH ASSIGNMENT OF ERROR:

"THE TRIAL COURT ERRED IN FAILING TO DETERMINE THAT THE JOB TARGETING PROGRAM IN WHICH APPELLEES J.A. GUY, INC. AND LOCAL 189 PARTICIPATE IS CONTRARY TO PUBLIC POLICY."

SIXTH ASSIGNMENT OF ERROR:

"THE TRIAL COURT ERRED IN DETERMINING THAT R.C. SECTION 4115.07 AND O.A.C. SECTION 4101:9-4-07 ARE PREEMPTED BY FEDERAL LAW UNDER SECTION 8 OF THE NATIONAL LABOR RELATIONS ACT UNDER *SAN DIEGO BLDG. TRADES COUNCIL V. GARMON*, 359 U.S. 236 (1959)."

On June 15, 1993, appellant filed the instant complaint against Appellee J.A. Guy, Inc. pursuant to R.C. Chapter 4115, Ohio's prevailing wage law. In the complaint, appellant alleged that it unsuccessfully bid on two contracts that Appellee J.A. Guy, Inc. won. The contracts were for the construction of the new Pickaway County Jail and for the installation of a water softening system for the jail. Appellant further alleged in pertinent part as follows that relative to those contracts, Appellee J.A. Guy, Inc. entered into an agreement with Appellee Local 189 whereby Appellee J.A. Guy, Inc. would deduct two percent from the workers' wages, pay that two percent to Appellee Local No. 189, and then Appellee Local 189

would return that two percent to Appellee J.A. Guy, Inc. in violation of Ohio's prevailing wage law:

> "10. Pursuant to R.C. Section 4115.07, J.A. Guy, Inc. is required to make full payment of the prevailing wage, and is prohibited from making any deduction not specifically permitted by R.C. Chapter 4115 or the regulations promulgated under R.C. Section 4115.12.
>
> 11. Ohio Administrative Code ('O.A.C.') Section 4101:9-4-07 allows certain deductions from wages, including deductions to pay regular union initiation fees and membership dues. Pursuant to O.A.C. Section 4101:9-4-07(B)(6), union fines or special assessments are specifically excluded from the list of permissible deductions.
>
> 12. Pursuant to an agreement between J.A. Guy, Inc. and Plumbers and Pipefitters Local Union No. 189, J.A. Guy, Inc. deducted 2% of the gross wages paid to its employees on the [construction of the new Pickaway County Jail and the][2] Water Softening System for Pickaway County Jail as a 'Market Recovery Assessment.'
>
> 13. The 'Market Recovery Assessment' is an unlawful 'special assessment' deduction prohibited by O.A.C. Section 4101:9-4-07(B)(6)."

On July 21, 1993, Appellee J.A. Guy, Inc. filed an answer and third-party complaint against Appellee Local

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[2] Paragraphs 10-13 of the complaint relate to the installation of the water softening system for the jail. In paragraphs 27-30 of the complaint, appellant repeated the above allegations in relation to the construction of the new Pickaway County Jail.

189. In the answer, Appellee J.A. Guy, Inc. alleged, *inter alia*, that appellant's claims are preempted by federal law. In the third-party complaint, Appellee J.A. Guy, Inc. alleged that if any violations of R.C. Chapter 4115 occurred, those violations were caused by acts or omissions of Appellee Local 189, including the use it made of union dues remitted by Appellee J.A. Guy, Inc.

On August 10, 1993, Appellee Local 189 answered the third-party complaint. Appellee Local 189 asserted various defenses to the third-party complaint, including the defenses that: (1) the claims in appellant's complaint are preempted by federal law; and (2) Ohio Adm. Code 4101:0-4-07,[3] to the extent that it is construed as prohibiting

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[3] Ohio Adm Code 4101:9-4-07 provides as follows:

4101:9-4-07 Permissible payroll deductions.

(A) The following deductions from wages may be made without application to and approval of the department of industrial relations:

(1) Any deduction from wages required by federal, state, or local law;

(2) Any deduction of amounts required by court order, process, or judgment to be paid to another unless collusion or collaboration exists between the employer and the employee for whose benefit the deduction is made;

(3) Any deduction which constitutes a contribution by the employee to funds, plans, or programs established by the employer or representatives of employees, or both, for the purpose of providing either from principal or income, or both, medical or hospital care, pensions or annuities on retirement, death benefits, compensation for injuries in addition to that required by Chapters 4121. and 4123. of the Revised Code, compensation for illness, accidents, sickness, or disability, or for insurance to provide any of the foregoing, or unemployment

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benefits in addition to those required by Chapter 4141. of the Revised Code or vacation pay.

(B) *The following deductions from wages may be made* only if, prior to commencement of work by the employee on any project, employers procure and maintain, in writing, proof of voluntary deductions signed by the employee:

(1) Savings accounts or similar savings plans for the benefit of employees, their families and dependents;

(2) Any deduction constituting a contribution toward the purchase of United States defense stamps or savings bonds;

(3) Any deduction enabling the employee to repay loans to or purchase shares in credit unions organized and operated in accordance with federal and state credit union statutes;

(4) Any deduction for the making of contributions to governmental or quasi-governmental agencies;

(5) Any deduction for the making of contributions to legitimate charitable institutions;

(6) *Any deductions to pay regular union initiation fees and membership dues, not including fines or special assessments, provided that a collective bargaining agreement between the employer and representatives of its employees permits such deductions and such deductions are not otherwise prohibited by law.*

(7) Any deduction for the making of contributions to a state or federal political action committee.

(C) Any deduction from wages not specifically permitted in paragraphs (A) and (B) of this rule shall be permitted only upon approval of the public authority and the director and must meet the following criteria:

(1) The deduction is not otherwise prohibited by law;

(2) The employer does not make a profit or benefit directly or indirectly from the deduction in any form, including, but not limited to, commissions or dividends;

deductions of union dues or assessments, is inconsistent with R.C. Chapter 4115.[4]

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(3) The deduction is either voluntarily consented to by the employee in writing, prior to the period in which the work is to be done, where such prior consent is not a condition for obtaining or continuing employment, or is provided for in a bona fide collective bargaining agreement between the employer and representatives of its employees; and

(4) The deduction serves the convenience and interest of the employee, his family or beneficiaries.

(D) Failure to provide evidence of voluntary deductions pursuant to paragraphs (B) and (C) of this rule constitutes a violation of section 4115.07 of the Revised Code.

(E) Failure to attain the approval of the public authority and the director for any deduction taken pursuant to paragraph (C) of this rule constitutes a violation of section 4115.07 of the Revised Code.

(F) An employer withholding a permissible payroll deduction pursuant to paragraph (A), (B) or (C) of this rule shall maintain complete records of the wages withheld, including any and all receipts for donations, contributions, fees, and dues paid on behalf of the employee, from the deductions withheld by the employer.

(G) Failure to comply with paragraph (F) of this rule constitutes a violation of section 4115.07 of the Revised Code.

(H) Any records required to be maintained by this rule shall be made available to the public authority and the department of industrial relations upon request.

(Emphasis added.)

[4] R.C. 4115.10 provides as follows:

(A) No person, firm, corporation, or public authority that constructs a public improvement with its own forces, the total overall project cost of which is fairly estimated to be more than the amounts set forth in division (B)(1) or (2) of section 4115.03 of the Revised Code, adjusted biennially by the administrator of employment services pursuant to section 4115.034 [4115.03.4] of

On October 19, 1993, Appellee Local 189 filed a motion for summary judgment. In support of the motion,

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the Revised Code, shall violate the wage provisions of sections 4115.03 to 4115.16 of the Revised Code, or suffer, permit, or require any employee to work for less than the rate of wages so fixed, or violate the provisions of section 4115.07 of the Revised Code. Any employee upon any public improvement, except an employee to whom or on behalf of whom restitution is made pursuant to division (C) of section 4115.13 of the Revised Code, who is paid less than the fixed rate of wages applicable thereto may recover from such person, firm, corporation, or public authority that constructs a public improvement with its own forces the difference between the fixed rate of wages and the amount paid to him and in addition thereto a sum equal to twenty-five per cent of that difference. The person, firm, corporation, or public authority who fails to pay the rate of wages so fixed also shall pay a penalty to the administrator of seventy-five per cent of the difference between the fixed rate of wages and the amount paid to the employees on the public improvement. The administrator shall deposit all moneys received from penalties paid to him pursuant to this section into the penalty enforcement fund, which is hereby created. The penalty enforcement fund shall be in the custody of the treasurer of state but shall not be part of the state treasury. The administrator shall use the fund for the enforcement of sections 4115.03 to 4115.16 of the Revised Code. The employee may file suit for recovery within sixty days of the administrator's determination of a violation of sections 4115.03 to 4115.16 of the Revised Code or is barred from further action under this division. Where the employee prevails in a suit, the employer shall pay the costs and reasonable attorney's fees allowed by the court.

(B) Any employee upon any public improvement who is paid less than the prevailing rate of wages applicable thereto may file a complaint in writing with the bureau of employment services upon a form furnished by the administrator. At the written request of any employee paid less than the prevailing rate of wages applicable, the administrator shall take an

Appellee Local 189 argued that: (1) because R.C. 4115.10(D) expressly permits the deduction of union dues

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assignment of a claim in trust for the assigning employee and bring any legal action necessary to collect the claim. The employer shall pay the costs and reasonable attorney's fees allowed by the court if the employer is found in violation of sections 4115.03 to 4115.16 of the Revised Code.

(C) If after investigation pursuant to section 4115.13 of the Revised Code, the administrator determines there is a violation of sections 4115.03 to 4115.16 of the Revised Code and a period of sixty days has elapsed from the date of the determination, and if:

(1) No employee has brought suit pursuant to division (A) of this section;

(2) No employee has requested that the administrator take an assignment of a wage claim pursuant to division (B) of this section.

The administrator shall bring any legal action necessary to collect any amounts owed to employees and the bureau. The administrator shall pay over to the affected employees the amounts collected to which the affected employees are entitled under division (A) of this section. In any action in which the administrator prevails, the employer shall pay the costs and reasonable attorney's fees allowed by the court.

(D) Where workmen are employed and their rate of wages has been determined as provided in section 4115.04 of the Revised Code, no person, either for himself or any other person, shall request, demand, or receive, either before or after such workman is engaged, that such workman pay back, return, donate, contribute, or give any part or all of said workman's wages, salary, or thing of value, to any person, upon the statement, representation, or understanding that failure to comply with such request or demand will prevent such workman from procuring or retaining employment, and no person shall, directly or indirectly, aid, request, or authorize any other person to violate this section. This division does not apply to any agent or representative of a duly constituted labor

from employee wages, the complaint fails to state a claim upon which relief can be granted; (2) even if appellant has stated a claim upon R.C. 4115.16(A) and (B), appellant's claims are preempted by federal law as explained in *San Diego Bldg. Trades Council v. Garmon* (1959), 359 U.S. 236, 79 S.Ct. 773, 3 L.Ed.2d 775 [hereinafter *Garmon*]; and (3) even if appellant's claims are not preempted by federal law, the deduction of dues from employee wages is expressly authorized by the collective bargaining agreement between the parties and by R.C. Chapter 4115 and accompanying regulations.

In a memorandum in support of the motion for summary judgment and in an accompanying affidavit, Appellee Local 189 explained as follows that its "Industry Advancement Program" results in money withheld from employees' paycheck going to the union and then back to the contractor:

> "Local 189, with the approval of its membership, has established a program called 'The Plumbers and Pipe Fitters Local 189 Industry Advancement Program.' The program was first

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organization acting in the collection of dues or assessments of such organization.

(E) The bureau shall enforce sections 4115.03 to 4115.16 of the Revised Code.

(F) For the purpose of supplementing existing bureau resources and to assist in enforcing division (E) of this section, the administrator may contract with a person registered as a public accountant under chapter 4701, of the Revised Code to conduct an audit of a person, firm, corporation, or public authority.

established in 1988 and is based on similar programs adopted throughout the United States and approved by the National Labor Relations Board.

The program is exclusively operated by Local 189. The purpose of the program is to promote the Organized Mechanical Construction Industry within the jurisdiction of Local 189 by such means as bid supplements on selected projects and for advertising educational programs, productivity studies and related activities. The essential elements of the Industry Advancement Program are as follows:

a) Local 189 determines a list of jobs to target. Contractors may request a job to be targeted but are not involved in the actual determination of jobs to be targeted;

b) Any approved contractor who is either a signatory to the collective bargaining agreement or who agrees to sign a contract with the union may participate in the program;

c) The program is funded entirely by union dues;

d) If a grant is approved, the contractor is paid monthly only on the amount of hours actually worked and based on the estimate of hours provided;

e) There is no agreement to reduce wages or fringes as established in the collective bargaining agreement. Only targeted jobs are provided a subsidy in the form of a grant to specific, approved contractors."

Appellee Local 189 argued that the money deducted from the employees' paychecks was for union dues, not for a special assessment. Appellee Local 189 cited *Garmon* for the proposition that states may not regulate activities which federal labor law either permits or prohibits, and cited *Wisconsin Department of Industry, Labor and Human Relations v. Gould, Inc.* (1986), 475 U.S. 282, 106 S.Ct. 1057, 89 L.Ed.2d 223, for the proposition that it is now firmly established that federal labor law has largely displaced state regulation of labor relations. Appellee Local 189 noted that in the National Labor Relations Board (NLRB) Region 9 Director's July 21, 1993 joint decision in *International Bhd. of Electrical Workers, AFL-CIO-CLC (Wagner-Smith Company)*, Case No. 9-CB-8493, *The Fred DeBra Co.*, (Case No. 9-CA-30588), and *International Bhd. of Workers, Local 82, AFL-CIO* (The Fred B. DeBra Co., Case No. 9-CB-8511), the NLRB Regional Director approved the allocation of union dues to a job-targeting program. Appellee Local 189 quoted from the Region 9 director's July 21, 1993 decision as follows:

> "Inasmuch as the job targeting program 'deductions' are not an additional assessment, but are merely a reallocation of periodic dues which are uniformly required of members, Local 82 did not violate the Act by securing them through checkoff authorization and the Employer did not engage in any unlawful conduct by effectuating the checkoff."

Appellee Local 189 noted that in *International Bhd. of Electrical Workers Local 48*, Case No. 36-CB-1299, decided April 22, 1987, and *Local 48, IBEW (Midway Electric, Bonneville Power)*, Case No. 36-CB-1302, decided April 28, 1987, the NLRB Region 19 Director reached a similar

conclusion with regard to union dues collected for a "Market Recovery Program."

On November 1, 1993, Appellee J.A. Guy, Inc. filed a motion for summary judgment. In a memorandum in support of the motion, Appellee J.A. Guy, Inc. argued, *inter alia*, that it lawfully deducted union dues from the wages it paid to employees. Appellee J.A. Guy, Inc. cited United States Department of Justice opinion 22 LRRM (BNA) 46 (1948) for the proposition that union "initiation fees and assessments, being incidents of membership, should be considered as falling within the classification of 'membership dues.' " Appellee J.A. Guy, Inc. further argued that employer deductions used by unions to finance job targeting programs fall within the category of "membership dues."

The parties conducted discovery during the next year. On August 31, 1994, the trial court gave appellant until that date to file a cross-motion for summary judgment.

On August 31, 1994, appellant filed a joint brief in opposition to appellees' motion for summary judgment and cross-motion for summary judgment. In the joint brief and motion, appellant contended that "at its core, Local 189's job targeting program is a kickback scheme, in which money earned by union members is transferred by the union contractor to the union, which then funnels the money back to the union contractor as a subsidy." When describing the scheme in detail, appellant referred to depositions of Appellee Local 189's financial secretary and treasurer Charles Gronbach, Appellee Local 189's

business manager Eugene Minix, and Appellee J.A. Guy, Inc.'s president John A. Guy, II.

Appellant argued, *inter alia*, that the doctrine of federal labor law preemption is not applicable to the case *sub judice*. In support of this argument, appellant cited *Pipefitters Local 392 v. Kokosing Constr. Co., Inc.* (1993), 90 Ohio App.3d 560, 630 N.E.2d 28, in which the First District held that the NLRA did not preempt a pipefitters union's claim seeking to insure that the higher prevailing wage for pipefitters was paid to laborers who performed process-piping work at a water treatment plant. Appellant distinguished the type of preemption contemplated in *Garmon* from the type of preemption appellees seek to apply in the case *sub judice*. Appellant argued that the *Garmon* preemption only applies to matters within the jurisdiction of the NLRB.

Appellant also argued that because the state, when administering the prevailing wage law, acts not as regulator but rather as a market participant, federal labor laws do not preempt the Ohio prevailing wage law. In support of this argument, appellant quoted *Building and Constr. Trades Council of the Metro. Dist. v. Associated Builders and Contractors of Massachusetts/Rhode Island, Inc.* (1993), 507 U.S. 218, 226-227, 113 S.Ct. 1190, 1196, 122 L.Ed.2d 565, 575-576, as follows:

> "When we say that the NLRA preempts state law, we mean that the NLRA prevents a State from regulating within a protected zone, whether it be a zone protected and reserved for market freedom, see *Machinists*, or for NLRB jurisdiction, see *Garmon*. A State does not regulate, however, simply by acting within one of

> these protected areas. When a State owns and manages property, for example, it must interact with private participants in the marketplace. *In doing so, the State is not subject to preemption by the NLRA, because preemption doctrines apply only to state regulation."*
>
> (Emphasis added.)

Appellant reasoned that Ohio's prevailing wage law sets forth the requirements for the performance of contracts for the construction of public improvements, and thus is an exercise of the state's power to manage public property rather than an attempt by the state to regulate either within a zone protected and reserved for market freedom or for NLRB jurisdiction.

On September 30, 1994, Appellee J.A. Guy, Inc. and Appellee Local 189 each filed a reply to appellant's cross-motion for summary judgment. They argued, *inter alia*, that Ohio Adm. Code 4104:9-4-07(B)(6) is preempted by federal law. In support of this argument, they cited two unreported common pleas court decisions, *Independent Electrical Contractors of Greater Cincinnati, Inc. v. Cty. of Hamilton* (Aug. 6, 1993), Hamilton C.P. Case No. A-9209065, unreported, and *J.A. Croson Co. v. Cent. Ohio Joint Vocational School Dist.* (Apr. 11, 1994), Madison C.P. No. 94CV-03-039, unreported, in which, appellees argue, the courts held that Ohio Adm. Code 4101:9-4-07(B)(6) directly conflicts with Section 302(C)(4) of the Labor Management Relations Act. Appellees further argued that the money deducted from employees' paychecks constituted dues, not a special assessment, and thus Appellee Local 189's job targeting program does not violate Ohio's prevailing wage law, R.C. Chapter 4115.

On October 17, 1994, appellant filed a reply memorandum in support of its cross-motion for summary judgment. In the memorandum, appellant again argued, inter alia, that the doctrine of federal labor law preemption is not applicable to the case *sub judice*. In support of this argument, appellant again cited *Pipefitters Local 392 v. Kokosing Constr. Co., Inc.* (1993), 90 Ohio App.3d 560, 630 N.E.2d 28. Appellant also argued again that the job targeting money deducted from the employees' paychecks is a special assessment prohibited by R.C. Chapter 4115.

Between December 2, 1994, and March 15, 1995, the parties filed ten supplemental memoranda arguing about the impact of several cases on the case *sub judice*. Those cases included *Manno Elec. Inc.* (July 20, 1994), NLRB Case No. 15-CA-11891, and *Independent Electrical Contractors of Greater Cincinnati, Inc. v. Hamilton Cty. Div. of Pub. Works* (1995), 101 Ohio App.3d 580, 656 N.E.2d 18, motion to certify overruled in (1995), 73 Ohio St.3d 1410, 651 N.E.2d 1308. In *Manno Elec., Inc.*, the NLRB wrote that the NLRA preempts a state court lawsuit charging that a job targeting program injured and restrained the non-union electrical contractor's business. In *Independent Electrical Contractors of Greater Cincinnati, Inc.*, the First District, when affirming the common pleas court's decision cited by appellees in earlier memoranda in the case *sub judice*, concluded that: (1) deductions from employees' paychecks used to fund union job targeting programs are not special assessments but are merely a reallocation of periodic dues; and (2) because the interests protected by the National Labor Relations Act (hereinafter NLRA) and R.C. Chapter 4115 do not involve "discrete concerns," the job targeting issue is preempted by federal law.

On March 28, 1995, the trial court issued an opinion finding that federal law preempts the job targeting issue in the case *sub judice*. In the opinion, the trial court wrote in pertinent part as follows:

> "In *San Diego Bldg. Trades Council v. Garmon*, (1959), 359 U.S. 236, the U.S. Supreme Court held:
>
> > '[w]hen an activity is arguably subject to (section) 7 or (section) 8 of the [National Labor Relations] Act, the States as well as the federal courts must defer to the exclusive competence of the National Labor Relations Board if the danger of state interference with the national policy is to be averted.' *Id.* at 245.
>
> The *Garmon* doctrine is designed to prevent conflict between state and local regulations and Congress's 'integrated scheme of regulation, embodied in the National Labor Relations Act, Sections 157 and 158, Title 29, U.S. Code. In passing the NLRA, Congress 'largely displaced state regulation of industrial relations.' *Wisconsin Dept. of Industry, Labor & Human Relations v. Gould, Inc.* (1986), 475 U.S. 282.
>
> In *Communication Workers of American* [sic] *v. Beck* (1988), 487 U.S. 735, the U.S. Supreme Court noted that section 8(a)(3) of the NLRA permits an employer and exclusive bargaining representative to enter into an agreement requiring all employees in the bargaining unit to pay periodic union dues as a condition of continued employment. *Id.* at 738. The Court found that a challenge to the use of union dues for purposes other than collective bargaining is subject to

Section 8 and therefore preempted under *Garmon*.

> The NLRA 'leaves the substantive terms of collective bargaining agreements to management and union representatives to hammer out in the collective bargaining process.' *Cannon v. Edgar* (C.A.7, 1994), 33 F.3d 880. Application of the Prevailing Wage Law as urged by J.A. Croson Company would allow the state to regulate the amount of union dues which could be withheld from members' paychecks and the purposes to which those dues could be put. J.A. Croson Company's characterization of the case is irrelevant, see *Bldrs. Assn. v. Commercial Piping Co.* (1982), 70 O.St.2d 9 at 14; it actually seeks to have the state control matters at the heart of the collective bargaining process, which is regulated by the NLRA. Under J.A. Croson Company's interpretation, J.A. Guy, Inc. could only comply with the prevailing wage law by breaching its duty to remit union dues under the collective bargaining agreement, a violation of section 8 of the NLRA. Therefore, the Court concludes that the issue is preempted under *Garmon*."

On April 11, 1995, the trial court entered judgment granting appellees' motion for summary judgment and denying appellant's cross-motion for summary judgment.

Appellant filed a timely notice of appeal.

We note that appellant failed to argue separately each of the six assignments of error as required by App.R. 16(A)(7). App.R. 12(A)(2) provides in pertinent part as follows:

> (2) The court may disregard an assignment of error presented for review if the party raising

> it fails to identify in the record the error on which the assignment of error is based or fails to argue the assignment separately in the brief, as required under App.R. 16(A).

In the interest of justice and judicial economy, we will address appellant's first, second and sixth assignments of error jointly. We note that appellant's first and second assignments of error challenge the trial court's disposition of appellees' motions for summary judgment and appellant's cross-motion for summary judgment. We will consider the first and second assignments of error jointly with appellant's sixth assignment of error because the preemption issue that appellant raises in the sixth assignment of error is central to the resolution of the first and second assignments of error.

We will not, however, address the merits of appellant's third, fourth, and fifth assignments of error. Those assignments of error challenge the fact that the trial court did not make certain determinations concerning whether Appellee J.A. Guy, Inc. violated Ohio's prevailing wage law. Because we find, *infra*, that the trial court erred by determining that federal law preempts the prevailing wage claim that appellant raises in this action, and because we accordingly are remanding this cause for further proceedings including but not limited to a determination as to whether any of the parties are entitled to summary judgment on grounds other than the preemption issue, we find appellant's third, fourth and fifth assignments of error are moot. See App.R. 12(A)(1)(c).

When resolving appellant's first and second assignments of error, we must determine whether the trial court

correctly granted appellees' motions for summary judgment and denied appellant's cross-motion for summary judgment. Summary judgment is appropriate when the movant demonstrates: (1) there is no genuine issue of material fact; (2) the moving party is entitled to judgment as a matter of law; and (3) reasonable minds can come to but one conclusion, and that conclusion is adverse to the party against whom the motion for summary judgment is made, said party being entitled to have the evidence construed most strongly in his favor. See *Turner v. Turner* (1993), 67 Ohio St.3d 337, 339-340, 617 N.E.2d 1123, 1126; *Bostic v. Conner* (1988), 37 Ohio St.3d 144, 146, 524 N.E.2d 881, 884; *Harless v. Willis Day Warehousing Co.* (1978), 54 Ohio St.2d 64, 66, 375 N.E.2d 46, 47. The moving party bears the burden of proving no genuine issue of material fact exists. See *Dresher v. Burt* (1996), 75 Ohio St.3d 280, 662 N.E.2d 264; *Mitseff v. Wheeler* (1988), 38 Ohio St.3d 112, 115, 526 N.E.2d 798, 801.

When reviewing a summary judgment, an appellate court must independently review the record to determine if summary judgment was appropriate. An appellate court need not defer to the trial court's decision in summary judgment cases. See *Morehead v. Conley* (1991), 75 Ohio App.3d 409, 599 N.E.2d 786.

In the case *sub judice*, the parties generally do not dispute the facts. The parties agree on the basics of the scheme employed by Appellee Local 189 to return two percent of employees' gross wages to Appellee J.A. Guy, Inc. in apparent violation of Ohio's prevailing wage law, R.C. Chapter 4115 and accompanying regulations. The parties disagree on application of law to the facts in the case *sub judice*. Specifically, the parties disagree on

whether federal law prevents the trial court from ruling on the merits of appellant's complaint brought pursuant to Ohio's prevailing wage law.[5]

Appellant argues, *inter alia*, that the prevailing wage law issue raised in the complaint is not preempted by federal law. In support of this argument, appellant argues that the form of preemption discussed in *Garmon* applies only when the state regulates an activity protected by the NLRA, or when the state regulates an activity that would constitute an unfair labor practice under the NLRA. Appellant argues that in the case *sub judice*, there have been no allegations of activities protected by the NLRA or activities that constitute unfair labor practices. Appellant, noting that "dues are regulated under the NLRA only to the extent that the deduction is necessary for collective bargaining," argues that the deduction taken from the employees' paychecks in the case *sub judice* and directed back to Appellee J.A. Guy, Inc., exceeded what was necessary for Appellee Local 189 to bargain collectively.

Appellant relies upon *General Elec. Co. v. New York State Dept. of Labor* (S.D.N.Y.1988), 698 F.Supp 1093, vacated on other grounds (C.A.2 1989), 891 F.2d 25, in which the district court rejected the plaintiff's claim that New York's prevailing wage statute was preempted by

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[5] The parties also disagree on whether appellees' scheme violates the Ohio prevailing wage law. Due to our decision on the preemption issue and our consequential remand of this cause for further proceedings consistent with this opinion, we do not address the issue of whether appellees' scheme violates the Ohio prevailing wage law.

the NLRA. Appellant quotes as follows from the district court's decision:

> "*Garmon* is inapplicable since the contested state action here does not attempt to regulate an activity which is either protected or prohibited under the NLRA. Sections 7 and 8 of the NLRA are not concerned with the substantive outcome of the collective bargaining process, and efforts by states to limit the outcome of that process do not impinge on the jurisdiction of the NLRB to determine what employer and employee conduct the NLRA prohibits or permits."

Id., 698 F.Supp. at 1096.

Appellant additionally argues that because Ohio acts as a market participant and not a regulator when administering the prevailing wage law, the application of the doctrine of preemption is inappropriate in the case *sub judice*. In support of this argument, appellant cites *Building and Constr. Trades Council of the Metro. Dist. v. Associated Builders and Contractors of Massachusetts/Rhode Island, Inc.* (1993), 507 U.S. ___, 113 S.Ct. 1190, 122 L.Ed.2d 565, in which the court wrote that the preemption doctrine only applies to state regulation, not to state participation in the market.

In response to appellant's brief, Appellee J.A. Guy, Inc. argues that the doctrine of preemption does apply in the case *sub judice*. In support of this argument, Appellee J.A. Guy, Inc. cites *Independent Electrical Contractors of Greater Cincinnati, Inc. v. Hamilton Cty. Div. of Pub. Works* (1995), 101 Ohio App.3d 580, 656 N.E.2d 18, motion to certify overruled in (1995), 73 Ohio St.3d 1410, 651 N.E.2d 1308, and *J.A. Croson Co. v. Central Ohio Joint Vocational*

School Dist. (1995), 104 Ohio App.3d 146, 661 N.E.2d 250. Appellee J.A. Guy, Inc. writes that "this is an easy case because job targeting programs have already been held to be protected by Section 7 of the National Labor Relations Act" in *Manno Elec., Inc.* (July 20, 1994), NLRB Case No. 15-CA-11891. Appellee J.A. Guy, Inc. notes that appellant's interpretation of Ohio's prevailing wage law would require Appellee J.A. Guy, Inc. to breach its duty to remit employee dues collected for job targeting programs, which duty is found in Section 302(C)(4) of the Labor Management Relations Act and permits the collection of dues and assessments.

Appellee Local 189, in response to appellant's brief, argues that "the scope of *Garmon* preemption is so broad as to encompass activities which are even *arguably* subject to the NLRA." Appellee Local 189 quotes Garmon as follows:

> "At times it has not been clear whether the particular activity regulated by the States was governed by Section 7 or Section 8 or was, perhaps, outside both these sections. But courts are not primary tribunals to adjudicate such issues. It is essential to the administration of the Act that these determinations be left in the first instance to the National Labor Relations Board. * * *
>
> * * * When an activity is *arguably* subject to Section 7 or Section 8 of the Act, the States as well as the federal courts must defer to the exclusive competence of the National Labor Relations Board if the danger of state interference with national policy is to be averted."
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> (Emphasis supplied by Appellee Local 189)

Id., 359 U.S. at 244-245, 79 S.Ct. at 783, 3 L.Ed.2d at 783. Appellee Local 189 further argues that the central issue in the case *sub judice* is whether the State of Ohio may restrict the type of union dues or union assessments which employers may deduct from employee paychecks. Appellee Local 189 notes that Section 302(C)(4) of the Labor Management Relations Act, 29 U.S.C. 186(C)(4), permits the deductions that Appellee J.A. Guy, Inc. made from employee paychecks in the case *sub judice*. Appellee Local 189 further notes that 29 U.S.C. 302(C)(4), unlike Ohio Adm. Code 4101:9-4-07(D), does not forbid the deduction of "special assessments." Appellee Local 189 cites various federal cases for the proposition that the NLRB has held that the term "membership dues" in 29 U.S.C. 302(C)(4) includes assessments used to fund job targeting programs such as Appellee Local 189's Industry Advancement Fund. Appellee Local 189 relies on both the trial court and the appellate court decisions in *Independent Electrical Contractors of Greater Cincinnati, Inc. v. Hamilton Cty. Div. of Public Works* (1995), 101 Ohio App.3d 580, 656 N.E.2d 18, motion to certify overruled in (1995), 73 Ohio St.3d 1410, 651 N.E.2d 1308.

Appellant, in reply to appellees' briefs, cites *General Electric Co. v. New York State Dept. of Labor* (S.D.N.Y.1988), 698 F.Supp. 1093, in which the district court, when rejecting a Garmon preemption argument, explained that the contractors could comply with the collective bargaining agreements and the state minimum wage statute by just paying *more* than what the state's minimum standards would require. Appellant criticized the decision *Independent Electrical Contractors of Greater Cincinnati, Inc. v. Hamilton Cty. Div. of Pub. Works* (1995), 101 Ohio App.3d 580,

656 N.E.2d 18, motion to certify overruled in (1995), 73 Ohio St.3d 1410, 651 N.E.2d 1308, as being based on the erroneous assumption that the contractor "could only comply with the prevailing wage law by breaching its duty to remit union dues under the collective bargaining agreement," and as being based on the erroreous assumption that in *IBEW, Local 82* (July 21, 1993), National Labor Relations Board No. 9-CB-8493, unreported, the NLRB had considered the identical issue. Appellant notes that in *IBEW, Local 82*, the NLRB *dismissed* the case, and, when stating that the conduct did not violate the NLRA, noted that the conduct might violate the Davis-Bacon Act, the federal equivalent of Ohio's prevailing wage law. Appellant further argues that *J.A. Croson Co. v. Central Ohio Joint Vocational School Dist.* (1995), 104 Ohio App.3d 146, 661 N.E.2d 250, did not involve Ohio's prevailing wage law and thus is inapplicable to the case *sub judice*. In conclusion, appellant claims that appellees' arguments are "grounded entirely upon erroneous assumptions and conclusions – assumptions and conclusions that are primarily made at the first level of review by an administrative agency or by a state trial court."

The parties filed numerous notices of supplemental authority. On August 11, 1995, appellee Local 189 filed a notice citing cases for the proposition that prevailing wage laws are not minimum wage laws. On September 20, 1995, appellant filed a notice citing cases for the proposition that prevailing wage laws *are* minimum wage laws.

On November 15, 1995, appellant filed a notice of a law review article, *Subsidizing Contractors to Gain Employment: Construction Union "Job Targeting"* by Herbert R. Northrup and Augustus T. White, scheduled to be published in the University of California Berkeley Journal of Employment and Labor Law, Vol. 17, No. 1, in January 1996. On December 27, 1995, Appellee J.A. Guy, Inc. filed a supplemental brief arguing that the law review article might be "partially or wholly revised, rewritten or not even published" as scheduled. On January 12, 1996, appellant submitted a final draft of the law review article and admitted that the article had been revised – to include a footnote mentioning the briefs that appellees have filed in this appeal. Appellant argued that the authors of the law review article continue to believe as follows:

> "In truth, it is not easy to see why preemption is even an issue in this litigation. The state is not attempting to regulate dues check-off. It is not calling into question the underlying collective bargaining agreements. It is not adjudicating a dispute properly before the National Labor Relations Board (NLRB)."

On November 17, 1995, appellant filed a notice citing *International Bhd. of Electrical Workers, Local 357 v. Brock* (C.A.9, 1995), 68 F.3d 1194, decided on October 20, 1995. In that case, the Ninth Circuit decided that a two percent deduction taken from employee paychecks for a job targeting program did not constitute "dues" as that term is used in the NLRA and thus violated the Davis-Bacon Act. The Ninth District, citing *Building and Constr. Trades Dept.*,

AFL-CIO v. Reich (C.A.D.C.1994), 40 F.3d 1275, wrote in pertinent part as follows:

> "The terms 'regular * * * membership dues' and 'special assessments' are neither defined in the Davis-Bacon Act nor in its implementing regulations. In *Building Trades*, the Administrator specifically rejected the contention, implicitly advanced to us, that deductions from an employee's wages to support a union's JTP constitute 'membership dues' within the meaning of Section 3.5(i). The Administrator so held in light of *a fundamental principle of the Davis-Bacon Act that wages paid to construction employees on public projects should not revert to contractors.* * * * "
>
> (Emphasis added.)

Id., 68 F.3d at 1202-1203.

On December 21, 1995, appellant filed a notice citing *Associated Builders and Contractors of Georgia, Inc. v. City of Atlanta* (N.D.Ga.1995), 2 Wage & Hour Cas.2d (BNA) 1530, decided on August 5, 1995. In that case, the district court decided that states and localities retain power to enact laws establishing minimum employment standards. The court reasoned that minimum labor standards affect union and nonunion employees equally, and neither encourage or discourage the collective bargaining processes that are the subject of the NLRA.

On February 9, 1996, appellant filed a notice citing *International Bhd. of Electrical Workers, Locals 11, 302, 340, 441, 569, 595 v. Aubry* (Cal.App.1996), ___ Cal. Rptr.2d ___, 96 Cal. Daily Ops. Serv. 661, decided on January 29, 1996. In that case, the California First District Court of

Appeals held that sums which workers are required to pay back to employers as wage rebates should not be counted when calculating the true wage rate "actually prevailing" for a given job classification under California law.

On March 12, 1996, appellant filed a notice citing *Kimbree v. Jolog Sportswear, Inc.* (S.C.1962), 123 S.E.2d 524. In that case, the South Carolina Supreme Court held that the NLRA does not preempt state court jurisdiction "where the consequences of the conduct involved were of compelling state interest." The court thus exercised jurisdiction over a claim by non-union employees that their employer had wrongfully withheld wages from them and given the withheld wages to a union which, after retaining a portion of the withheld wages, distributed the remainder to the non-union employees as "vacation pay."

On May 13, 1996, appellee filed a notice citing the United States Supreme Court's decision denying certiorari in *J.A. Croson Co. v. Central Ohio Joint Vocational School Dist.* (1995), 104 Ohio App.3d 146, 661 N.E.2d 250, and citing *Phoenix Electric Co. v. Natl. Elec. Contractors Assn.* (C.A.6, 1996), ___ F.3d ___.

On June 26, 1996, appellant filed a notice citing United States General Accounting Office Report B-272085 dated June 3, 1996 and sent to Congressman William M. Thomas of the United States House of Representatives. In the report, the General Accounting Office wrote in pertinent part as follows:

> "This letter responds to your concerns about the Department of Labor's position on job targeting programs (JTP) under the Davis-Bacon

> Act. JTPs are programs in which local union members agree to contribute a specified percentage of their gross wages to a fund administered by the local union. This fund is then used to subsidize the bids of union contractors (employers who are signatories to collective bargaining agreements or agree to be) on selected construction contracts. On the basis of your concerns, you asked that we provide information on (1) Labor's interpretation of the Davis-Bacon Act regarding the use of JTPs on federal construction projects and (2) the activities Labor has taken to enforce its position on JTPs.
>
> * * *
>
> In summary, Labor has ruled that JTP payroll deductions from wages of workers employed on federal construction projects violate Labor regulations that dictate the types of deductions that can be taken from worker's wages from their employment on federal projects. [footnote omitted.] Labor has found that deductions to fund a JTP are not allowed under these regulations, regardless of the deduction's effect on workers' wages. *The Davis-Bacon Act is at issue only when JTP deductions reduce the workers' wages below prevailing wage levels because that violate* [sic] *the act's requirement that workers on federal construction projects be paid prevailing wages without subsequent deductions or rebates."*
>
> (Emphasis added.)

After reviewing the arguments of the parties and the authorities cited by the parties, we conclude that the trial court erred by finding that the NLRA preempts state court jurisdiction over the R.C. Chapter 4115 prevailing wage claim that appellant raises in this case. We disagree

with the trial court's characterization of appellant's claim as seeking "to have the state control matters at the heart of the collective bargaining process, which is regulated by the NLRA." As we discuss *infra*, we find that appellant's claim, rather than addressing the collective bargaining *process*, addresses the substance of the collective bargaining agreement between Appellee J.A. Guy, Inc. and Appellee Local 189. Further, we disagree with the trial court's reasoning that because Appellee J.A. Guy, Inc. "could only comply with the prevailing wage law by breaching its duty to remit union dues under the collective bargaining agreement, a violation of section 8 of the NLRA," preemption exists in this case. Compliance with the prevailing wage law does not necessitate violation of the collective bargaining agreement. Assuming *arguendo* the scheme in the case *sub judice* violates Ohio's prevailing wage law, Appellee J.A. Guy, Inc. can comply with the prevailing wage law and simultaneously avoid liability for violating the collective bargaining agreement by paying its employees more money.

We agree with the trial court that in *Garmon* the court established an "arguably subject to Section 7 or Section 8 of the [NLRA]" preemption standard. We note that Section 7 of the NLRA protects certain concerted activities and Section 8 of the NLRA prohibits unfair labor practices. 29 U.S.C. Sections 157 & 158. The Garmon court wrote in pertinent part as follows:

> "When an activity is arguably subject to Section 7 or Section 8 of the Act, the States as well as the federal courts must defer to the exclusive competence of the National Labor

> Relations Board if the danger of state interference with national policy is to be averted."

After the *Garmon* decision, however, the United States Supreme Court carved exceptions to the "arguably subject to" preemption standard.

In *Connell Constr. Co. v. Plumbers and Steamfitters Local Union No. 100* (1975), 421 U.S. 616, 626, 44 L.Ed.2d 418, 428, 95 S.Ct. 1830, the court held that "federal courts may decide labor law questions that emerge as collateral issues in suits brought under independent federal remedies, including anti-trust laws."

In *Farmer v. United Bhd. of Carpenters and Joiners of America, Local 25* (1977), 430 U.S. 290, 51 L.Ed.2d 338, 97 S.Ct. 1056, the court recognized the trend away from a strict *Garmon* "arguably subject to Section 7 or Section 8 of the Act" standard. The court wrote in pertinent part as follows:

> "But the same considerations that underlie the *Garmon* rule have led to [sic] the Court to recognize exceptions in appropriate classes of cases. We have refused to apply the pre-emption doctrine to activity that otherwise would fall within the scope of *Garmon* if that activity 'was merely a peripheral concern of the Labor Management Relations Act * * * ' "

Id., 430 U.S. at 296, 97 S.Ct. at 1061, 51 L.Ed.2d at 347-348. The *Farmer* court emphasized as follows that courts must avoid inflexible application of the preemption doctrine:

> "Our cases indicate * * * that inflexible application of the doctrine is to be avoided, especially where the State has a substantial interest in regulation of the conduct at issue and

> the State's interest is one that does not threaten undue interference with the federal regulatory scheme. With respect to Hill's claims of intentional infliction of emotional distress, we cannot conclude that Congress intended exclusive jurisdiction to lie in the Board."

Id., 430 U.S. at 302, 97 S.Ct. at 1064, 51 L.Ed.2d at 351. The *Farmer* court held that the NLRA does not preempt an action brought in state court by a union member against the union for intentional infliction of emotional distress.

In *Sears, Roebuck and Co. v. San Diego County District Council of Carpenters* (1978), 436 U.S. 180, 98 S.Ct. 1745, 56 L.Ed.2d 209, the court made its largest leap away from the strict *Garmon* "arguably subject to Section 7 or Section 8 of the Act" preemption doctrine. The *Sears* court, quoting and following *Farmer*, wrote in pertinent part as follows:

> "While the *Garmon* formulation accurately reflects the basic federal concern with potential state interference with national labor policy, the history of the labor pre-emption doctrine in this Court does not support an approach which sweeps away state-court jurisdiction over conduct traditionally subject to state regulation without careful consideration of the relative impact of such jurisdiction bar on the various interests affected. As the Court noted last Term:
>
> > 'Our cases indicate * * * that inflexible application of the doctrine is to be avoided, especially where the State has a substantial interest in regulation of the conduct at issue and the State's interest is one that does not threaten undue interference with the federal regulatory scheme.'

> *Farmer v. Carpenters*, 430 U.S. 290, 302, 97 S.Ct. 1056, 1064, 51 L.Ed.2d 338. Thus the Court has refused to apply the *Garmon* guidelines in a literal, mechanical fashion. * * * "

Id., 436 U.S. at 188, 98 S.Ct. at 1752-1753, 56 L.Ed.2d at 219-220.

The *Sears* court established an "identical or different" preemption test to be applied by the courts. Under this test, courts must determine if a controversy is identical to or different from the controversy that could have been presented to the NLRB. The *Sears* court wrote in pertinent part as follows:

> "The critical inquiry, therefore, is not whether the State is enforcing a law relating specifically to labor relations or one of general application but whether the controversy presented to the state court is identical to (as in *Garner*) or different from (as in *Farmer*) that which could have been, but was not, presented to the Labor Board. *For it is only in the former situation that a state court's exercise of jurisdiction necessarily involves a risk of interference* with the unfair labor practices jurisdiction of the Board which the arguably prohibited breach of the *Garmon* doctrine was designed to avoid."
>
> (Emphasis added.)

Id., 436 U.S. at 197, 98 S.Ct. at 1757-1758, 56 L.Ed.2d at 225-226. See, also, *Anderson v. U.S. Gypsum Co.* (1987), 42 Ohio App.3d 112, 114-115, 536 N.E.2d 1180, 1182. If the controversy is identical to the controversy that could have been presented to the NLRB, then preemption applies. If the controversy is different from the controversy that could have been presented to the NLRB, then

preemption does not apply. The *Sears* court cautioned, however, that when the plaintiff has no method of invoking the jurisdiction of the NLRB, preemption does not apply:

> "The primary-jurisdiction rationale unquestionably requires that when the same controversy may be presented to the state court or the NLRB, it must be presented to the Board. But that rationale does not extend to cases in which an employer has no acceptable method of invoking, or inducing the Union to invoke, the jurisdiction of the Board. We are therefore persuaded that the primary-jurisdiction rationale does not provide a *sufficient* justification for pre-empting state jurisdiction over arguably protected conduct when the party who could have presented the protection issue to the Board has not done so and the other party to the dispute has no acceptable means of doing so."

Id., 436 U.S. at 202-203, 98 S.Ct. at 1760, 56 L.Ed.2d at 228-229.

In the case *sub judice*, we find that the controversy appellant presents is very different from the controversy that appellees allege is subject to NLRB jurisdiction. Appellant, an outsider to the collective bargaining agreement between Appellee Local 189 and Appellee J.A. Guy, Inc., brings this action pursuant to Ohio's prevailing wage law. In response, appellees assert that the NLRA preempts jurisdiction over this case because this case involves a collective bargaining agreement dues-deduction issue that should be litigated before the NLRB. That collective bargaining agreement dues-deduction issue, however, does not involve appellant. Appellant is an

outsider to the collective bargaining agreement. As an outsider to the collective bargaining agreement, appellant has no acceptable means of presenting the dues-deduction issue to the NLRB. Hence, pursuant to *Sears*, appellant's prevailing wage claim is not preempted by the NLRA.

The United States Supreme Court's departure from the strict *Garmon* "arguably subject to Section 7 or Section 8 of the NLRA" preemption standard continued in the 1980s. In *Metropolitan Life Ins. Co. v. Commonwealth of Massachusetts* (1985), 471 U.S. 724, 85 L.Ed.2d 728, 105 S.Ct. 2380, the court held that the NLRA does not preempt a Massachusetts statute that requires specified minimum mental health benefits. The court, focusing on the purpose of the NLRA, concluded that the NLRA was not intended to supplant state or federal legislation that imposes minimum terms of employment. The court wrote [sic] pertinent part as follows:

> "The NLRA is concerned primarily with establishing an equitable process for determining terms and conditions of employment, and not with particular substantive terms of the bargain that is struck when the parties are negotiating from relatively equal positions. See Cox, Recent Developments in Federal Labor Law Preemption, 41 Ohio St. LJ 277, 297 (1980), The NLRA's declared purpose is to remedy '[t]he inequality of bargaining power between employees who do not possess full freedom of association or actual liberty of contract, and employers who are organized in the corporate or other forms of ownership association.' Section 1, 29 U.S.C. Section 151 [29 USCS Section 151]. The same section notes the desirability of

'restoring equality of bargaining power' among other ways, 'by encouraging the practice and procedure of collective bargaining and by protecting the exercise by workers of full freedom of association, self-organization, and designation of representatives of their own choosing, for the purpose of negotiating the terms and conditions of their employment or other mutual aid protection.'

One of the ultimate goals of the Act was the resolution of the problem of 'depress[ed] wage rates and the purchasing power of wage earners in industry,' 29 U.S.C. Section 151 [29 U.S.C.S. Section 151], and the 'widening gap between wages and profits,' 79 Cong. Rec. 2371 (1935), (remarks of Sen. Wagner), thought to be the cause of economic decline and depression. Congress hoped to accomplish this by establishing procedures for more equitable bargaining.

The evil Congress was addressing thus was entirely unrelated to local or federal regulation establishing minimum terms of employment. Neither inequality of bargaining power nor the resultant depressed wage rates were thought to result from the choice between having terms of employment set by public law or having them set by private agreement. No incompatibility exists, therefore, between federal rules designed to restore the equality of bargaining power, and state or federal legislation that imposes minimal substantive requirements on contract terms negotiated between parties to labor agreements, at least so long as the purposes of the state legislation is not incompatible with these general goals of the NLRA.

> Accordingly, it has never been argued successfully that minimal labor standards imposed by other *federal* laws were not to apply to unionized employers and employees. * * * Nor has Congress ever seen fit to exclude unionized workers and employees from laws establishing federal minimum employment standards. We see no reason to believe that for this purpose Congress intended state minimum labor standards to be treated differently from minimum federal standards.
>
> Minimum state labor standards affect union and nonunion employees equally, and neither encourage nor discourage the collective bargaining processes that are the subject of the NLRA. Nor do they have any but the most indirect effect on the right of self-organization established in the Act. Unlike the NLRA, mandated-benefits laws are not laws designed to encourage or discourage employees in the promotion of their interests collectively; rather, they are in part 'designed to give specific minimum protections to *individual* workers and to ensure that *each* employee covered by the Act would receive, the mandated health insurance coverage. * * * "

Id., 471 U.S. at 753-755, 85 L.Ed.2d at 749-750, 105 S.Ct. at 2396-2397. The court further wrote that "most significantly, there is no suggestion in the legislative history of the Act that Congress intended to disturb the myriad state laws then in existence that set minimum labor standards, but were unrelated in any way to the processes of bargaining or self-organization. *Id.*, 471 U.S. at 756, 85 L.Ed.2d at 750, 105 S.Ct. at 2396-2397.

The trial court in the case *sub judice* cited *Wisconsin Dept. of Industry, Labor and Human Relations v. Gould, Inc.* (1986), 475 U.S. 282, 106 S.Ct. 1057, 89 L.Ed.2d 223, for the proposition that in passing the NLRA, Congress 'largely displaced state regulation of industrial relations.' In *Wisconsin*, the court held that the NLRA preempts a Wisconsin law which debarred certain repeat violators of the NLRA from doing business with the state. The court wrote in pertinent part as follows:

> "The manifest purpose and inevitable effect of the debarment rule is to enforce the requirements of the NLRA. The goal may be laudable, but it assumes for the State of Wisconsin a role Congress reserved exclusively for the Board."

Id., 475 U.S. 291, 106 S.Ct. 1064, 89 L.Ed.2d at 231. We note that in the case *sub judice*, the Ohio prevailing wage law does not enforce the requirements of the NLRA.

In *Fort Halifax Packing Co., Inc. v. Coyne* (1987), 482 U.S. 1, 96 L.Ed.2d 1, 107 S.Ct. 2211, the court held that the NLRA does not preempt a Maine statute requiring a one-time severance payment to employees in the event of a plant closing. The court reasoned that the Maine law's establishment of a minimum labor standard does not intrude upon the collective bargaining process. The court wrote in pertinent part as follows:

> "It is true that the Maine statute gives employees something for which they otherwise might have to bargain. That is true, however, with regard to any state law that substantially regulates employment conditions. Both

> employers and employees come to the bargaining table with rights under state law that form a 'backdrop' for their negotiations. * * * "

Id., 482 U.S. at 21, 96 L.Ed.2d at 17, 107 S.Ct. at 2222. In the case *sub judice*, the bargaining table "backdrop" includes Ohio's prevailing wage law.

The trial court in the case *sub judice* commented that in *Communication Workers of American v. Beck* (1988), 487 U.S. 735, 108 S.Ct. 2641, 101 L.Ed.2d 634, the court noted that Section 8(a)(3) of the NLRA permits an employer and a union to enter into an agreement requiring all employees in the bargaining unit to pay periodic union dues as a condition of continued employment. The trial court further commented that in *Beck* the court found that a challenge to the use of union dues for purposes other than collective bargaining is subject to Section 8 and "therefore preempted under *Garmon*."

In our view, however, *Beck* supports appellant's position in this appeal. Although the *Beck* court held that the NLRA has primary jurisdiction to resolve an NLRA Section 8 challenge to the use of union dues for purposes other than collective bargaining, the *Beck* court stated that the lower courts may decide the merits of the dues issue if such a decision is necessary to the disposition of a related issue. The *Beck* court wrote in pertinent part as follows:

> "At the outset, we address briefly the jurisdictional question that divided the Court of Appeals. Respondents sought relief on three separate federal claims: that the exaction of fees beyond those necessary to finance collective bargaining activities violates Section 8(a)(3); that

such exactions violate the judicially created duty of fair representation; and that such exactions violate respondents' First Amendment rights. We think it clear that the courts below properly exercised jurisdiction over the latter two claims, but that the National Labor Relations Board(NLRB or Board) had primary jurisdiction over respondents' Section 8(a)(3) claim.

* * *

* * * The Court of Appeals erred, then, to the extent that it concluded it possessed jurisdiction to pass directly on respondents' Section 8(a)(3) claim.

The court was not precluded, however, from deciding the merits of this claim insofar as such a decision was necessary to the disposition of respondents' duty-of-fair-representation challenge. Federal courts may resolve unfair labor practices questions that 'emerge as collateral issues in suits brought under independent federal remedies,' *Connell Construction Co. v. Plumbers*, 421 U.S. 616, 626, 95 S.Ct. 1830, 1937, 44 L.Ed.2d 418 (1975), * * * "

(Emphasis added.)

Id., 487 U.S. at 742-743, 108 S.Ct. at 2647, 101 L.Ed.2d at 644-645. Thus, although courts may not directly pass upon NLRA issues, courts may decide an NLRA issue if such a decision is necessary to the determination of a non-NLRA issue. Accordingly, the trial court in the case *sub judice* may decide appellees' collective bargaining agreement dues-deduction issue if such a decision is necessary to the determination of the prevailing wage issue that appellant raises in the complaint.

In the 1990s, the United States Supreme Court continued its departure from the strict *Garmon* "arguably subject to Section 7 or Section 8 of the NLRA" preemption rule. In *Building and Construction Trades Council of the Metropolitan District v. Associated Builders and Contractors of Massachusetts/Rhode Island. Inc.* (1993), 507 U.S. 218, 113 S.Ct. 1190, 122 L.Ed.2d 565, the court emphasized that it was reluctant to infer preemption. The court wrote in pertinent part as follows:

> "The NLRA contains no express pre-emption provision. Therefore, in accordance with settled pre-emption principles, we should not find MWRA's bid specifications pre-empted ' " ' * * * unless it conflicts with federal law or would frustrate the federal scheme, or unless [we] discern from the totality of the circumstances that Congress sought to occupy the field to the exclusion of the States.' " ' *Metropolitan Life Ins. Co. v. Massachusetts*, 471 U.S. 724, 747-784, 105 S.Ct. 2380, 2393, 85 L.Ed.2d 728 (1985) (citations omitted). We are reluctant to infer pre-emption. [Citations omitted.] 'Consideration under the Supremacy Clause starts with the basic assumption that Congress did not intend to displace state law.' *Maryland v. Louisiana*, 451 U.S. 725, 746, 101 S.Ct. 2114, 2129, 68 L.Ed.2d 576 (1981). * * * "

Id., 507 U.S. at 224, 113 S.Ct. at 1194, 122 L.Ed.2d at 574. In *Building and Construction Trades Council*, the court declined to infer preemption even though the state had entered a zone reserved for NLRB jurisdiction. The court held that although the NLRA prevents states from acting as regulators in zones reserved for NLRB jurisdiction, the

NLRA does not prevent states from acting as market participants in zones reserved for NLRB jurisdiction.

At this juncture, we note that appellant, citing *Building and Construction Trades Council*, argues that Ohio was acting as a market participant in the case *sub judice* and thus NLRA preemption does not apply. We reject appellant's argument that Ohio was acting as a market participant in the case *sub judice*. Ohio's action in this case involves far more than the contract for the construction of the Pickaway County Jail and the contract for the water softening system for the jail. Ohio's action in this case is R.C. Chapter 4115, the prevailing wage law. The prevailing wage law has a broad regulatory impact on countless employers and employees.

In *Livadas v. Bradshaw* (1994), 512 U.S. 107, 129 L.Ed.2d 93, 114 S.Ct. 2068, the court held that the NLRA preempts a California policy against enforcing a state wage-payment statute on behalf of employees covered by collective bargaining agreements containing arbitration clauses. When reaching its conclusion, the court emphasized that the purpose of the NLRA is to protect the right to bargain collectively. The court wrote in pertinent part as follows:

> "A state rule predicating benefits on refraining from conduct protected by federal labor law poses special dangers of interference with congressional purpose. * * * This unappetizing choice, we conclude, was not intended by Congress, see *infra*, and cannot ultimately be reconciled with a statutory scheme premised on the centrality of the right to bargain collectively and the desirability of resolving contract disputes

> through arbitration. Cf. *Metropolitan Life Ins. Co. v. Massachusetts*, 471 U.S. 724, 755, 85 L.Ed.2d 728, 105 S.Ct. 2380 (1985), (state law held not pre-empted because it 'neither encourage[s] nor discourage[s] the collective bargaining process.')"

Id., 512 U.S. at ___, 129 L.Ed.2d at 105-106, 114 S.Ct. at 2074-2075. In the case *sub judice*, Ohio's prevailing wage law neither encourages nor discourages the collective bargaining *process*.

More than once when deciding NLRA preemption issues, the United States Supreme Court has emphasized that the NLRA addresses the collective bargaining *process*, not the *substance* of collective bargaining agreements.[6] In *Metropolitan Life*, the court wrote that "the NLRA is concerned primarily with establishing an equitable process for determining terms and conditions of employment, and not with particular substantive terms of the bargain that is struck when the parties are negotiating from relatively equal positions." *Id.*, 471 U.S. at 753, 85 L.Ed.2d at 749, 105 S.Ct. at 2396. In *Fort Halifax*, the court wrote that

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[6] The trial court in the case *sub judice* cited *Cannon v. Edgar* (C.A.7, 1994), 33 F.3d 880, for the proposition that the NLRA "leaves the substantive terms of collective bargaining agreements to management and union representatives to hammer out in the collective bargaining process." In *Cannon*, the court held that the NLRA preempted an Illinois state law requiring gravedigger unions to provide a pool of workers to dig graves during strikes.

In light of the United States Supreme Court's pronouncements in the collective bargaining process/substance arena, we are not persuaded by the sentence that the trial court in the case *sub judice* quoted from *Cannon*.

"[b]oth employers and employees come to the bargaining table with rights under state law that form a 'backdrop' for their negotiations." *Id.*, 482 U.S. at 21, 96 L.Ed.2d at 17, 107 S.Ct. at 2222.

Other federal court preemption decisions have echoed this concern that the NLRA addresses the bargaining process, not the substance of collective bargaining agreements. In *Beckwith v. United Parcel Service, Inc.* (C.A.1, 1989), 889 F.2d 344, the First Circuit followed *Metropolitan Life* and *Fort Halifax* and held that the NLRA does not preempt a Maine statute regulating the execution of agreements providing for payroll deductions as a condition of employment. The First Circuit, emphasizing the process/substance distinction, wrote in pertinent part as follows:

> "In relevant respects, Section 629 is substantially similar to the minimum standards statutes at issue in *Metropolitan Life* and *Fort Halifax*. *Metropolitan Life* involved a state law requiring that minimum mental health benefits be provided under certain health insurance policies while *Fort Halifax* concerned a state statute requiring employers to provide a one-time severance payment to employees in the event of a plant closing. Like the statutes in those cases, Section 629 simply regulates the *substance* of the agreement between the parties and not the bargaining *process*. And like those statutes, section 629 sets what the state believes to be a minimum standard. Maine has prohibited a technique for resolving employer claims against employees that it deems substandard – *i.e.*, below the minimally acceptable level – because of its high risk

> of unfairness to the employee. [Footnote omitted.]
>
> We see no way in which this minimum labor standards law conflicts with federal labor policy. The Court in both *Metropolitan Life* and *Fort Halifax* explicitly rejected the argument that a state's establishment of minimum substantive labor standards undercuts collective bargaining and therefore conflicts with the NLRA. The Court emphasized that Congress was not concerned with the particular substantive terms of the bargain struck between the employers and employees. * * * "
>
> (Emphasis *sic*.)

Id., 889 F.2d at 347-348.

In another federal decision recognizing the process/substance distinction, *General Electric Co. v. New York State Dept. of Labor* (S.D.N.Y.1988), 698 F.Supp. 1093, the district court held that the NLRA does not preempt New York State's prevailing wage law. That court wrote in pertinent part as follows:

> "Sections 7 and 8 of the NLRA are not concerned with the substantive outcome of the collective bargaining process, and efforts by states to limit the outcome of that process do not impinge on the jurisdiction of the NLRB to determine what employer and employee conduct the NLRA prohibits or permits."

Id. at 1096. When rejecting the plaintiff's argument that prevailing wage statutes are not minimum wage statutes, the court wrote that prevailing wage statutes "have a legal effect on covered employers and employees exactly like other minimum wage statutes." *Id.* at 1098.

We note that three other courts have recently decided claims involving prevailing wage laws allegedly violated by job targeting program schemes between unions and contractors. In *Building and Construction Trades Dept., AFL-CIO v. Reich* (C.A.D.C.1994), 40 F.3d 1275, the court held that job targeting program payroll deductions violated the Davis-Bacon Act. The District of Columbia Circuit wrote in pertinent part as follows:

> "It is clear that these [federal prevailing wage law] regulations evince an overarching concern that deductions from the employee's prevailing wages under the Davis-Bacon Act do not benefit the employer directly or indirectly. Accordingly, Labor's decision that JTP deductions, deductions that benefit employers, are not permissible under Section 3.5(i) as membership dues is not a plainly erroneous interpretation of its own regulations.
>
> * * *
>
> In *Beck*, 487 U.S. at 745, 108 S.Ct. at 2648, the Court concluded that the periodic dues that a non-union member may be required to pay under the NLRA are limited to those funds necessary for collective bargaining, grievance adjustment, and contract administration. Thus, even if the NLRA were relevant to the meaning of membership dues in Labor's regulations, recent NLRA case law does not support the unions' argument because JTP deductions would not qualify as periodic dues under the Act."

Id., 1281-1282. In *International Bhd. of Electrical Workers, Local 357 v. Brock* (C.A.9, 1995), 68 F.3d 1194, "traveling" union members challenged the local union's requirement

that they pay a two percent gross wage as an assessment to support the local union's jobs targeting program. The Ninth Circuit, citing the above District of Columbia Circuit case, held that a fundamental principle of the Davis-Bacon Act is that wages paid to construction employees should not revert to contractors. In *International Bhd. of Electrical Workers, Locals 11, 302, 340, 441, 569, 595 v. Aubry* (Cal.App.1996), ___ Cal.Rptr.2d ___, 96 Cal. Daily Ops. Serv. 661, the court, citing the above two cases, held that sums which workers are required to pay back to employers as wage rebates should not be counted when calculating the true wage rate "actually prevailing" for a given job classification under California law. We cite these three cases to demonstrate that NLRA preemption did not prevent those courts from making their decisions.

After reviewing the above cases, we conclude than [sic] that the NLRA does not preempt the trial court's jurisdiction over the R.C. Chapter 4115 prevailing wage claim that appellant raises in this case. Appellant's claim does not seek "to have the state control matters at the heart of the collective bargaining process, which is regulated by the NLRA." Appellant's claim, in fact, does not address the collective bargaining *process* at all. Rather, appellees' defense to appellant's claim addresses a minute portion of the *substance* of the collective bargaining agreement between Appellee J.A. Guy, Inc. and Appellee Local 189. As the above cases illustrate, Congress did not intend the NLRA to supplant minimum labor standards. Ohio's prevailing wage law is a minimum labor standard law that is part of the backdrop of all collective bargaining in the state.

Ironically, we note that contrary to the thrust of appellees' arguments in this appeal, the Ohio prevailing wage law was passed in an effort to support, not harm, the collective bargaining process. In *State ex rel. Evans v. Moore* (1982), 69 Ohio St.2d 88, 431 N.E.2d 311, syllabus, the court held:

> "Ohio's prevailing wage law, R.C. 4115.03 through 4115.15, which: (1) manifests a genuine statewide concern for the integrity of the collective bargaining process in the building and construction trades through a comprehensive statutory plan of worker rights and remedies, and (2) has significant extraterritorial effects, beyond the scope of any municipality's local self-government or police powers, preempts any conflicting local ordinance."

The court emphasized that the primary purpose is "to support the integrity of the collective bargaining process by preventing the undercutting of employee wages in the private construction sector." *Id.*, 69 Ohio St.2d at 91, 431 N.E.2d at 313. Accord *Harris v. Atlas Single Ply Systems, Inc.* (1992), 64 Ohio St.3d 171, 173, 593 N.E.2d 1376, 1378; *Ohio Asphalt Paving, Inc. v. Ohio Dept. of Indus. Relations* (1992), 63 Ohio St.3d 512, 515, 589 N.E.2d 35, 37; *Harris v. Van Hoose* (1990), 49 Ohio St.3d 24, 26, 550 N.E.2d 461, 463.

We acknowledge that appellees rely heavily on two Ohio Court of Appeals decisions – *Independent Electrical Contractors of Greater Cincinnati, Inc. v. Hamilton Cty. Div. of Pub. Works* (1995), 101 Ohio App.3d 580, 656 N.E.2d 18, jurisdictional motion overruled in (1995), 73 Ohio St.3d 1410, 651 N.E.2d 1308, and *J.A. Croson Co. v. Central Ohio*

Joint Vocational School Dist. (1995), 104 Ohio App.3d 146, 661 N.E.2d 250. We further acknowledge that Appellee J.A. Guy, Inc. writes that "this is an easy case because job targeting programs have already been held to be protected by Section 7 of the National Labor Relations Act" in *Manno Elec., Inc.* (July 20, 1994), NLRB Case No. 15-CA-11891. We find, however, that neither the two Ohio appellate cases nor the NLRB case persuade us to depart from the solid body of federal cases, *supra*, that leads us to conclude that the NLRA does not preempt the trial court's jurisdiction over the R.C. Chapter 4115 prevailing wage claim that appellant raises in this case.

For several reasons, we disagree with the First District's decision in *Independent Electrical Contractors of Greater Cincinnati, Inc.*, First, we note that the First District cited *Communication Workers of American v. Beck* (1988), 487 U.S. 735, 108 S.Ct. 2641, 101 L.Ed.2d 634, for the proposition that a challenge to the use of union dues for purposes other than collective bargaining is subject to Section 8 and therefore preempted under *San Diego Bldg. Trades Council v. Garmon* (1959), 359 U.S. 236, 79 S.Ct. 773, 3 L.Ed.2d 775. As we discussed, *supra*, in our view *Beck* supports appellant's position in this appeal. Although the *Beck* court held that the NLRA has primary jurisdiction to resolve an NLRA Section 8 challenge to the use of union dues for purposes other than collective bargaining, the *Beck* court stated that the lower courts may decide the merits of the dues issue if such a decision is necessary to the disposition of a related issue. Second, in response to the First District's contention that the employer "could only comply with the Prevailing Wage Law by breaching

its duty to remit union dues under the collective bargaining agreement," we note that the employer could comply with both the prevailing wage law and the collective bargaining agreement by paying the employees more money. Third, we note that the First District cited a July 21, 1993 letter by the NLRB in *Re Internatl. Bhd. of Elec. Workers, Local 82*, NLRB Region 9 Nos. 9-CB-8493, 9-CA-30588, and 9-CB-8511, unreported, for the proposition that "[t]he NLRB has considered the identical issue argued by IEC, concluding that deductions used to fund job-targeting programs are not special assessments but merely a reallocation of periodic dues." In that letter, however, the NLRB conceded that the Davis-Bacon Act would govern the dues-deduction controversy relative to federal projects falling under that Act.

To the extent that *J.A. Croson Co. v. Central Ohio Joint Vocational School Dist.* (1995), 104 Ohio App.3d 146, 661 N.E.2d 250, relates to the preemption issue in the case *sub judice*, we disagree with that decision from the Twelfth District. In that case, the plaintiff, an unsuccessful bidder, argued that the successful bidder's participation in a union's job targeting program violated Ohio's competitive bidding statute, R.C. 3313.46. It is important to note that the plaintiff did not argue the prevailing wage issue. The Twelfth District, when concluding that the NLRA pre-empted the case, however, commented that "[a]pplication of R.C. 3313.46 in this cause would allow a state court to regulate the procedure by which a union administers job targeting." This comment implies that state courts may never regulate the procedure by which unions administer job targeting, even if the job targeting scheme violates the state's prevailing wage law. The

strength of the implication becomes more apparent when one realizes that the Twelfth District relied upon the First District's *Independent Electrical Contractors of Greater Cincinnati, Inc.* decision. As we discussed, *supra*, however, we disagree with that decision. Thus, we disagree with the Twelfth District's *J.A. Croson Co.* decision to the extent that it implies that the NLRA preempts the trial court's jurisdiction over the R.C. Chapter 4115 prevailing wage claim that appellant raises in this case.

The Twelfth District also relied upon the Administrative Law Judge's opinion in *Manno Elec., Inc.*, (July 20, 1994), NLRB Case No. 15-CA-11891, which opinion Appellee J.A. Guy, Inc. claims resolves the preemption issue in this case. We emphasize that the prevailing wage issue did not arise in *Manno Elec., Inc.*, In *Manno Elec., Inc.*, the union filed multiple NLRA charges against a non-union electrical contractor alleging substantial NLRA Section 7 and Section 8 violations. The union filed one of the charges, Case 15-CA-12170, against both the contractor and Jack L. Manno, Sr., the owner of the contractor. In this one charge, the union alleged that the electrical contractor and Manno participated in an unfair labor practice – the filing of a state court lawsuit against the union. In paragraph five of the state court lawsuit petition, the contractor and Manno alleged that the union's job targeting program injured and restrained the trade of their electrical contracting business. When determining whether the filing of the state court lawsuit was an illegal unfair labor practice, the ALJ wrote in pertinent part:

> "The 'job targeting program' is a practice utilized by the Union to make possible competitive bidding for jobs by union contractors

> against nonunion contractors. It works this way. The Union supplements the wages of the employees of certain union employers so that they may bid on a parity with non-union contractors whose payscale is lower. By this method the Union is able to maintain the Union wage scale on the job and obtain work for its members. Obviously, it also benefits the union contractor.
>
> Section 7 provides that employees shall have the right 'to engage in other concerted activities for the purpose of * * * other mutual aid or protection.' The objectives of the 'job targeting program' are to protect employees' jobs and wage scales. These objectives are protected by Section 7. Thus, the plaintiff's suit, which interferes with, restrains, and coerces employees in their Section 7 rights, offends Section 8(a)(1) of the Act. The claims which the Plaintiff sought to press were preempted."

Again, we note that *Manno Elec., Inc.* did not involve a prevailing wage controversy. The ALJ's decision in *Manno Elec., Inc.* included no mention of whether the job targeting program in that case ran afoul of a federal or state prevailing wage law.

Further, we note that in *Manno Elec., Inc.* the ALJ wrote that "plaintiff's suit, which interferes with, restrains, and coerces employees in their Section 7 rights, offends Section 8(a)(l) of the Act." In the case *sub judice,* we do not believe that the prevailing wage claim appellant raises in the complaint "interferes with, restrains, and coerces employees" in their NLRA rights. When we understand that Appellee J.A. Guy, Inc. can satisfy both the prevailing wage law and the collective bargaining

agreement by paying its employees more money, we find that the instant prevailing claim has no effect on the employees' NLRA rights.

We find that the preemption argument, when viewed in context of the fact that Appellee A.J. [sic] Guy, Inc. can satisfy both the prevailing wage law and the collective bargaining agreement by paying its employees more money, is a red herring. As the United States Supreme Court stated in *Fort Halifax Packing Co., Inc. v. Coyne* (1987), 482 U.S. 1, 21, 96 L.Ed.2d 1, 17, 107 S.Ct. 2211, 2222:

> "It is true that the Maine statute gives employees something for which they otherwise might have to bargain. That is true, however, with regard to any state law that substantially regulates employment conditions. Both employers and employees come to the bargaining table with rights under state law that form a '"backdrop'" for their negotiations. * * * "

Ohio's prevailing wage law does not prevent unions and contractors from agreeing to participate in job targeting programs; Ohio's prevailing wage law merely serves as a "backdrop" for discussions between unions and contractors concerning job targeting programs.

We agree with Herbert R. Northup and Augustus T. White when they commented about the First District's *Independent Electrical Contractors of Greater Cincinnati, Inc.* decision and about the appellees, briefs in the case *sub judice* in pertinent part as follows:

> "In truth, it is not easy to see why preemption is even an issue in this litigation. The state is not attempting to regulate dues check-off. It is

> not calling into question the underlying collective bargaining agreements. It is not adjudicating a dispute, properly before the National Labor Relations Board (NLRB) or interfering in the zone left by Congress to the free play of economic forces. The state is simply attempting to define what counts as payment of prevailing wages for purposes of its own competitive bidding statutes. This is surely a process which is both innocuous and necessary. * * * There are many cogent arguments on both sides, but no real issue of federal labor policy. The union parties remain free to deduct as much as they will, just as the non-union contractor remains free to receive kickbacks. Neither, however, should expect credit toward payment of the prevailing wage under the present Ohio statute."

Northrup & White, Subsidizing Contractors to Gain Employment: Construction Union "Job Targeting" (1996), 17 Berkeley Journal of Employment and Labor Law 62, 81.

In conclusion, we note that the trial court granted summary judgment to appellees and denied summary judgment to appellant for the sole reason that it believed appellant's claim to be preempted by federal labor law. We find that the trial court erred in denying summary judgment to appellant on the ground that its claim is preempted by federal labor law. We reverse the trial court's judgment and we remand this cause for further proceedings including but not limited to a determination as to whether any of the parties are entitled to summary judgment on grounds other than the preemption issue. Although some of our discussion in this opinion by necessity touches upon issues other than the preemption

issue, we leave to the trial court the determination of issues other than the preemption issue. In particular, we leave to the trial court a determination of whether appellees' actions violated Ohio's prevailing wage law.

Accordingly, based upon the foregoing reasons, we sustain appellant's first, second and sixth assignments of error, and we remand this cause for further proceedings consistent with this opinion.

JUDGMENT REVERSED AND CAUSE REMANDED FOR FURTHER PROCEEDINGS CONSISTENT WITH THIS OPINION.

JUDGMENT ENTRY

It is ordered that the judgment be reversed and cause remanded for further proceedings consistent with this opinion. It is further ordered that appellant recover of appellees costs herein taxed.

The Court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate issue out of this Court directing the Pickaway County Common Pleas Court to carry this judgment into execution.

A certified copy of this entry shall constitute that mandate pursuant to Rule 27 of the Rules of Appellate Procedure.

Exceptions.

Stephenson, J.: Concurs in Judgment & Opinion
Kline, J.; Concurs in Judgment Only

For the Court

By: /s/ Peter B. Abele
Peter B. Abele
Presiding Judge

NOTICE TO COUNSEL

Pursuant to Local Rule No. 12, this document constitutes a final judgment entry and the time period for further appeal commences from the date of filing with the clerk.

APPENDIX C

IN THE COURT OF COMMON PLEAS,
PICKAWAY COUNTY, OHIO

J.A. Croson Co.,	:	No. 93-CI-000094
Plaintiff,	:	
vs.	:	OPINION
J.A. Guy, Inc.,	:	(Filed Mar. 28, 1995)
Defendant and Third-Party Plaintiff,	:	
vs.	:	
United Association of Journeymen and Apprentices of the Plumbing and Pipe Fitting Industry of the United States and Canada, Local 189,	:	
Third-Party Defendant.	:	

KNECE, P. RANDALL, JUDGE:

Plaintiff J.A. Croson Company ("Croson") is a mechanical contractor with its principal place of business in Franklin County, Ohio.

Defendant J.A. Guy, Inc., is a mechanical contractor incorporated in the State of Ohio with its principal place of business in Franklin County, Ohio. J.A. Guy, Inc.'s employees are members of and are represented by Third-Party Defendant United Association of Journeymen and Apprentices of the Plumbers and Pipe Fitters Industry of the United States and Canada Local 189 ("Local 189"). It

appears that Croson was an unsuccessful bidder for construction of the water softening system for the new Pickaway County Jail. Croson claims that defendant J.A. Guy, Inc. violated the Ohio prevailing wage statute by deducting 2% of the gross wages paid its employees as a "Market Recovery Assessment." ("Assessment"). The Assessment is then paid by J.A. Guy, Inc. to Local 189.

J.A. Guy, Inc. and Local 189 are parties to a collective bargaining agreement in which J.A. Guy, Inc. agreed to withhold union dues from the pay checks of employees who signed proper authorizations and to send the money directly to Local 189. The amount of dues is set by the Union and its members; J.A. Guy, Inc. has no say in the amount of dues or their use. However, it is conceded that a portion of the dues are used for job targeting programs. A job targeting program is the payment of money by a union to a union contractor, such as J.A. Guy, Inc., on a specific job. This payment in effect lowers the union contractor's cost on the project improved by the union. The money for this program is paid out of a specific fund. Union members contribute money to this fund. They generally do this through some means of dues deduction. For example, Local 189 of the Plumbers and Pipe Fitters Union requires their members to pay 2% of gross wages to the union job targeting fund.

Plaintiff contends that all Plumbers and Pipe Fitters Local unions operating in the State of Ohio have a similar type of assessment. This means that for every job that is a public job (requiring the payment of prevailing wages) that 2% of the gross wages paid by union contractors to members of Local 189 (and other local plumbers unions)

are funneled directly to the union's job targeting program.

Plaintiff contends that Ohio has an anti-kick back statute for all prevailing wage jobs in Ohio. Specifically, plaintiff cites the Court to Ohio Revised Code Section 4115.10 (D). This statute prohibits workers from being required to give away part of their wages with the possibility of the employee loosing [sic] his job if the payments are not made. There is, however, an exemption for labor unions for the "collection of dues or assessments of such organization."

Plaintiff contends that every plumbers union has a requirement in its contract that employers must deduct for union dues and assessments. Every employee is required to be a member of the union. Failure to pay all dues and assessments is grounds to deny these people membership in the union. Any employee who refuses to pay into a job targeting fund is subject to discharge because the union will deny them membership in their union which is a condition of their employment with the contractor.

The regulations that interpret the Ohio Prevailing Wage Statute allow for the deduction of "regular union initiation fees and membership dues." *Ohio Admin. Code* Sections 4101-1:9-4-07 (B)(6). Deductions of union "assessments" are specifically excluded from this section of the regulation. *Id.*

With respect to assessments, another regulation section states that other than normal dues, no other assessments can be deducted from the workers' wages without the specific approval of the public authority and the

director and that the assessment must meet certain criteria, one of which is the following:

> "The employer does not make a profit or benefit directly or indirectly from the deduction in any form, including, but not limited to, commission or dividends." See Ohio Admin. Code, Section 4101-1:9-4-07(C)(2).

The gravamen of plaintiff's complaint is that J.A. Guy, Inc. violated R.C. Section 4115.07 by deducting 2% of the gross wage paid to its employees on the water softening system for the new Pickaway County Jail for "Market Recovery Assessment."

On June 15, 1993, J.A. Croson Company filed a complaint pursuant to Ohio Revised Code Section 4115.16(B) against J.A. Guy, Inc. alleging that it violated the prevailing wage law, R.C. Chapter 4115. Plaintiff contends that J.A. Guy, Inc. made illegal deductions from the prevailing wages of employees working on the Pickaway County Jail of monies that were placed in the job targeting program fund. On July 21, 1993 J.A. Guy, Inc. filed a third-party complaint for indemnification against Local 189.

J.A. Croson Co. filed a motion for summary judgment. Defendant J.A. Guy, Inc. and third-party defendant Local 189 also filed motions for summary judgment in which they allege that the matter is preempted by federal law.

In *San Diego Bldg. Trades Council v. Garmon*, (1959), 359 U.S. 236, the U.S. Supreme Court held:

> "[w]hen an activity is arguably subject to (section) 7 or (section) 8 of the [National Labor Relations] Act, the States as well as the federal

> courts must defer to the exclusive competence of the National Labor Relations Board if the danger of state interference with the national policy is to be averted." *Id.* at 245.

The *Garmon* doctrine is designed to prevent conflict between state and local regulation and Congress's "integrated scheme of regulation" embodied in the National Labor Relations Act, Sections 157 and 158, Title 29, U.S. Code. In passing the NLRA, Congress "largely displaced state regulation of industrial relations." *Wisconsin Dept. of Industry, Labor & Human Relations v. Gould, Inc.*, (1986) 475 U.S. 282.

In *Communication Workers of America v. Beck* (1988), 487 U.S. 735, the U.S. Supreme Court noted that section 8(a)(3) of the NLRA permits an employer and exclusive bargaining representative to enter into an agreement requiring all employees in the bargaining unit to pay periodic union dues as a condition of continued employment. *Id.* at 738. The Court found that a challenge to the use of union dues for purposes other than collective bargaining is subject to Section 8 and therefore preempted under *Garmon*.

The NLRA "leaves the substantive terms of collective bargaining agreements to management and union representatives to hammer out in the collective bargaining process." *Cannon v. Edgar* (C.A.7, 1994), 33 F.3d 880. Application of the Prevailing Wage Law as urged by J.A. Croson Company would allow the state to regulate the amount of union dues which could be withheld from members' paychecks and the purposes to which those dues could be put. J.A. Corson Company's characterization of the case is irrelevant, see *Bldrs. Assn. v. Commercial*

Piping Co. (1982), 70 O. St. 2d 9 at 14; it actually seeks to have the state control matters at the heart of the collective bargaining process, which is regulated by the NLRA. Under J.A. Croson Company's interpretation, J.A. Guy, Inc. could only comply with the prevailing wage law by breaching its duty to remit union dues under the collective bargaining agreement, a violation of section 8 of the NLRA. Therefore, the Court concludes that the issue is preempted under *Garmon*.

For the foregoing reasons, the Court hereby grants the motions for summary judgment as filed by defendant and third-party plaintiff, J.A. Guy, Inc., and third-party defendant Local 189. The Court overrules J.A. Croson Company's motion for summary judgment.

Counsel for J.A. Guy, Inc. shall prepare and circulate an entry reflecting this decision.

/s/ P. Randall Knece
P. RANDALL KNECE,
JUDGE
03-27-95

APPEARANCES:

ON BEHALF OF PLAINTIFF,
J.A. CROSON CO.:

Ronald L. Mason, Esquire
EMENS, KEGLER, BROWN, HILL & RITTER
Attorneys at Law
65 East State Street, Suite 1800
Columbus, Ohio 43215

ON BEHALF OF DEFENDANT AND
THIRD-PARTY PLAINTIFF,
J.A. GUY, INC.:

Felix C. Wade, Esquire
Edwin L. Skeens, Esquire
SCHOTTENSTEIN, ZOX AND DUNN
Attorneys at Law
41 South High Street, Suite 2600
Columbus, Ohio 43215

ON BEHALF OF THIRD-PARTY
DEFENDANT, LOCAL 189:

Orla E. Collier, III, Esquire
BENESCH, FRIEDLANDER, COPLAN & ARONOFF
Attorneys at Law
88 East Broad Street, Suite 900
Columbus, Ohio 43215

APPENDIX D

IN THE COURT OF COMMON PLEAS
PICKAWAY COUNTY, OHIO

J.A. CROSON COMPANY,	:	
Plaintiff,	:	CASE NO. 93CI-94
vs.	:	JUDGE KNECE
J.A. GUY, INC.	:	
Defendant and Third-Party Plaintiff.	:	

JUDGMENT ENTRY

(Filed Apr. 11, 1995)

For the reasons set forth in this Court's Decision filed on March 28, 1995, this Court hereby sustains the Motions for Summary Judgment filed by Defendant and Third-party Plaintiff, J.A. Guy, Inc. ("J.A. Guy") and by Third-Party Defendant United Association of Journeymen and Apprentices of the Plumbing and Pipe Fitting Industry of the United States and Canada, Local 189 ("Local 189"). The Motion for Summary Judgment filed by Plaintiff J.A. Croson Co. is hereby overruled. The Court finds that there is no genuine issue as to any material fact, that J.A. Guy and Local 189 are entitled to judgment as a matter of law, and that reasonable minds can come to but one conclusion, and that conclusion is adverse to Plaintiff J.A. Croson Co.

The Court hereby renders judgment in favor of J.A. Guy and Local 189 and against Plaintiff J.A. Croson Co.

and dismisses this cause with prejudice. The costs of this action are hereby assessed against Plaintiff.

/s/ P. Randall Knece
Judge P. Randall Knece
4-11-95

APPROVED BY:

J 246 Pg 585

/s/ Felix C. Wade/by Edwin L. Skeens
Felix C. Wade (0024462)
Edwin L. Skeens (0038902)
Schottenstein, Zox & Dunn
41 S. High St., Suite 2600
Columbus, Ohio 43215
Phone: (614) 462-2221
Fax: (614) 464-1135
Attorneys for Defendant/Third-Party Plaintiff

/s/ Orla E. Collier/by Edwin L. Skeens per authority
Orla E. Collier (0014317)
Rex A. Littrell (0042419)
Benesch, Friedlander, Coplan & Arnoff
88 E. Broad Street, Suite 900
Columbus, Ohio 43215
Attorneys for Third-Party Defendant

/s/ Ronald L. Mason/by Edwin L. Skeens per authority
Ronald L. Mason (0030110)
EMENS, KEGLER, BROWN, HILL & RITTER
65 East State Street
Suite 1800
Columbus, Ohio 43215
Attorney for Plaintiff

STATE OF OHIO
DEPARTMENT OF INDUSTRIAL RELATIONS
2323 West Fifth Avenue P.O. Box 825
Columbus, Ohio 43216

(SEAL)

GEORGE V. VOINOVICH
Governor

JOHN P. STOZICH
Director

March 11, 1993

Ronald L. Mason, Esq.
Emens, Hurd, Kegler & Ritter Co.
65 East State Street, Suite 1800
Columbus, Ohio 43215

RE: Pickaway County Justice Center
Water Softening System
Case #92-267

Dear Mr. Mason:

An investigation into the wages paid by J.A. Guy, Inc. performing work on the above named project indicated violations of the Ohio Prevailing Wage Law. This will advise you that this office has issued a determination pertaining to these violations.

If you need additional information regarding this matter, please do not hesitate to contact this office.

Yours very truly,

/s/ Michael D. Allen, Chief
Division of Prevailing Wage,
Minimum Wage and Minors
(614) 644-2239

MDA:ba

Supreme Court, U.S.
FILED
AUG 5 1998
OFFICE OF THE CLERK

(2)

No. 98-89

IN THE

Supreme Court of The United States

October Term, 1998

J.A. CROSON COMPANY,

Petitioner,

v.

J.A. GUY, INC., ET AL.,

Respondents.

On Petition For A Writ Of Certiorari To The Supreme Court Of Ohio

BRIEF OF AMICUS CURIAE ASSOCIATED BUILDERS AND CONTRACTORS, INC., IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

Maurice Baskin
(Counsel of Record)
David R. Warner
Venable, Baetjer, Howard
& Civiletti, LLP
1201 New York Ave., N.W.
Washington, D.C. 20005
202-962-4800

Attorneys for Amicus Curiae

August 6, 1998

Balmar Legal Publishing Services, Washington, D.C. (202) 682-9800

TABLE OF CONTENTS

PAGE

TABLE OF AUTHORITIES ii

INTEREST OF THE AMICUS 1

STATEMENT OF THE CASE 3

REASONS FOR GRANTING THE WRIT 3

I. THE CONFLICT BETWEEN THE FUNDING OF JOB TARGETING PROGRAMS AND THE ENFORCEMENT OF PREVAILING WAGE LAWS IS AN ISSUE OF NATIONAL IMPORTANCE WHICH SHOULD BE RESOLVED BY THIS COURT 3

II. THE HOLDING OF THE SUPREME COURT OF OHIO CONFLICTS WITH THE DECISIONS OF THIS COURT AND THE CIRCUIT COURTS 7

A. The Supreme Court Of Ohio Erred In Finding All State Regulation Of Job Targeting Programs To Be Preempted By Virtue Of The *Manno Electric* NLRB Decision 8

B. No Authority Requires Preemption Of Ohio's Prevailing Wage Law; Rather, The Law Should Be Enforced Against Job Targeting Programs Which Are Funded Through Unlawful Rebates Of Prevailing Wages Paid on State-Funded Projects 10

C. Prevailing Wage Laws Are An Exercise Of Historic Police Power Of The State To Establish And Enforce Minimum Employment Standards Of General Application 12

CONCLUSION 15

TABLE OF AUTHORITIES

CASES **PAGE**

Associated Builders and Contractors, Inc., Golden Gate Chapter v. Local 302, IBEW, 109 F. 3d 1353 (9th Cir. 1997 ..... 6, 10

Building and Construction Trades Dept., AFL-CIO v. Reich, 40 F. 3d 1275 (D.C. Cir. 1995). 2, 5, 6, 10

California Division of Labor Standards Enforcement v. Dillingham Construction, N.A., Inc., 117 S. Ct. 832 (1997). 3, 4, 12

Fort Halifax Packing Co., Inc. v. Coyne, 482 U.S. 1 (1987) 14

Harris v. Van Hoose, 550 N.E. 2d 461 (1990) 12

IBEW, Local 357 v. Brock, 68 F. 3d 1194 (9th Cir. 1995) 2, 4, 10

IBEW v. Aubry, (Cal. App. 1996), 41 Cal. App. 4th 1632, 49 Cal. Rptr. 2d 759 ..... 7, 11

Manno Electric, Inc., 321 NLRB No. 93 (1996) 8

Metropolitan Life Ins. Co. v. Commonwealth of Massachusetts, 471 U.S. 724 (1985) 12, 14

New York State Conference of Blue Cross & Blue Shield Plans v. Travelers Ins. Co., 115 S. Ct. 1671, (1995) 13

Rice v. Santa Fe Elevator Corp., 331 U.S. 218 (1947) 13

San Diego Bldg. Trades Council v. Garmon, 359 U.S. 236 (1959) 8

State ex rel. Evans v. Moore, 69 Ohio St. 2d 88, 91 (1982). 2, 4, 12

PAGE

OTHER

Metzger, "Buying the Job," VII Labor Research Review 51 (Fall 1988) 5

Northrup & White, "Subsidizing Contractors to Gain Employment: Construction Union 'Job Targeting,'" 17 Berkeley Journal of Employment and Labor Law 62 (1996) 4

No. 98-89

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October Term, 1998

J.A. CROSON COMPANY,

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On Petition For A Writ Of Certiorari To The Supreme Court Of Ohio

BRIEF OF AMICUS CURIAE ASSOCIATED BUILDERS AND CONTRACTORS, INC., IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

INTEREST OF THE AMICUS

Associated Builders and Contractors, Inc. ("ABC") is a national trade association of more than 20,000 construction industry contractors and related firms. ABC represents all segments of the industry, including both unionized and non-union employers, many of whom perform work on public construction projects covered by prevailing wage laws at both the state and federal levels. Petitioner J.A. Croson Company is a member of ABC.

More than 800 of ABC's other members, employing thousands of workers, also are located in the State of Ohio. Many of these contractors perform work covered under Ohio's Prevailing Wage Law, which has been in existence since 1931. The stated purpose of the law is the same as the federal Davis-Bacon Act, *i.e.*, to prevent contractors from

undercutting employee wages in the process of competing for government construction work. *State ex rel. Evans v. Moore*, 69 Ohio St. 2d 88, 91 (1982).

Thus, when performing work covered by the Prevailing Wage Law, ABC's member employers, like all employers covered by the statute, are required to pay their employees in accordance with the minimum labor standards established by the Ohio Department of Industrial Relations. Contractors are not permitted to arrange for portions of the employee wages paid in accordance with the Prevailing Wage Law to be deducted and later returned to the employers, either directly or indirectly.

Union job targeting programs are of much more recent vintage than the Prevailing Wage Law. They were created in the 1980's expressly as a device for returning portions of employee wages to unionized employers who claimed to be uncompetitive with lower cost, non-union contractors. In order to obtain an increased share of the construction market, practitioners of job targeting undercut their employee/members' wages on a "pooled" basis, while returning those wages to employers in a selective, or targeted fashion. *See* Metzger, "Buying the Job," VII Labor Research Review 51, 53-4 (Fall 1988)("[E]ach working electrician is losing 60 cents an hour and that money is going out of his/her pocket and into the pocket of a contractor.")

ABC was the first organization at the national level to point out the conflict between certain union job targeting programs and prevailing wage laws. ABC first challenged the funding mechanisms of job targeting programs under the federal Davis-Bacon Act in a proceeding which began in 1989 and which ultimately led to the D.C. Circuit's seminal holding in *Building and Construction Trades Dep't, AFL-CIO v. Reich*, 40 F.3d 1275 (D.C. Cir. 1995). The D.C. Circuit's holding then was reaffirmed by the Ninth Circuit in *IBEW, Local 357 v. Brock*, 68 F. 3d 1194 (9th Cir. 1995).

ABC's filing of an amicus brief in the present action is prompted by the Supreme Court of Ohio's recent decision, the

logic of which effectively forecloses any state from enforcing a prevailing wage law against unions and union contractors involved in a job targeting program. ABC strongly supports the contentions of Petitioner Croson that job targeting programs violate Ohio's Prevailing Wage Law, for many of the reasons identified by the D.C. Circuit and Ninth Circuit relative to the federal Davis-Bacon Act. ABC further agrees that the Ohio court's decision is in direct conflict with this Court's decision in *California Division of Labor Standards Enforcement v. Dillingham Const. NA, Inc.*, 117 S. Ct. 832 (1997), which upheld the states' traditional right to enforce their prevailing wage laws, against similar claims of federal labor law preemption. For each of these reasons, this Court should grant the writ and reverse the decision of the Supreme Court of Ohio.

STATEMENT OF THE CASE

Amicus ABC adopts the statement of the case set forth in the Petition for Writ of Certiorari.

REASONS FOR GRANTING THE WRIT

I. THE CONFLICT BETWEEN THE FUNDING OF JOB TARGETING PROGRAMS AND THE ENFORCEMENT OF PREVAILING WAGE LAWS IS AN ISSUE OF NATIONAL IMPORTANCE WHICH SHOULD BE RESOLVED BY THIS COURT.

The rebate of government-mandated wages from workers back to contractors is facially antithetical to prevailing wage laws. *Building and Construction Trades Dep't, AFL-CIO v. Reich*, 40 F.3d 1275 (D.C. Cir. 1995); *IBEW, Local 357 v. Brock*, 68 F. 3d 1194 (9th Cir. 1995). This Court has further held that prevailing wage laws are traditional exercises of state police powers which are not preempted by federal labor law. *California Division of Labor Standards Enforcement v. Dillingham Const. NA, Inc.*, 117 S. Ct. 832 (1997). Absent

reversal, the decision of the Ohio Supreme Court in the present case will allow unionized contractors to exempt themselves from the traditionally established prevailing wage requirements of at least 33 states, with regard to publicly funded rebates subsidizing job targeting programs. The Ohio court's erroneous expansion of federal labor law preemption will have clear adverse impact on a national scale and must be reversed.

Since 1931, the Davis-Bacon Act has required that wages paid on federal public works projects equal wages paid on similar construction jobs in a given federal project's locale. A fundamental purpose of the Act was to "provide a minimum wage for construction workers in order to prevent contractors from underbidding local competition" on federal jobs. *International Brotherhood of Elec. Workers, Local 357 v. Brock*, 68 F.3d 1194, 1201 (9th Cir. 1995). In the same year that Congress enacted Davis-Bacon, Ohio enacted its own Prevailing Wage Law mandating analogous wage requirements with regard to state-funded projects. It has been recognized that the purpose of the Ohio law is the same as the federal Davis-Bacon Act—to prevent contractors from undercutting employee wages in the process of competing for government construction work. *See, e.g., State ex rel. Evans v. Moore*, 431 N.E.2d 311, 313 (1982).

Ohio is not the only state which has enacted a prevailing wage law mirroring the federal mandates of Davis-Bacon. To date, at least thirty-three (33) states have enacted such laws establishing minimum wages to be paid to employees working on public contracts. Northrup & White, "Subsidizing Contractors to Gain Employment: Construction Union 'Job Targeting,'" 17 *Berkeley Journal of Employment and Labor Law* 62, 80 (1996). In recognition of their federal progenitor, these state statutes often are referred to as "Little Davis-Bacon" statutes. *Id. See also California Division of Labor Standards Enforcement v. Dillingham Construction, N.A., Inc.*, 117 S. Ct. 832, 835, 840 (1997)

In order to effect their requirement that a prevailing wage ***actually be paid*** to laborers, Davis-Bacon and its state progeny have provisions expressly prohibiting contractors from receiving a rebate or "kick back" of money from the wages paid to their workers. For example, Davis-Bacon requires that employees be paid "without subsequent deduction or rebate . . . regardless of any contractual relationship which may exist between the contractor or subcontractor and such laborers . . . ." *Building and Construction Trades Dep't, AFL-CIO v. Reich*, 40 F.3d 1275, 1277 (D.C. Cir. 1994) (quoting 40 U.S.C. § 276a(a)). Any kickback or rebate made in contravention of this provision could result in the imposition of civil liability. *Brock*, 68 F.3d at 1198.

Despite nearly a half-century of restraint on kickbacks and rebates, in the 1980's unions created job targeting programs expressly as a device for returning portions of employee wages to unionized employers who claimed to be uncompetitive with lower cost, non-union contractors. In order to obtain an increased share of the construction market, practitioners of job targeting have chosen to undercut their employee/members' wages on a "pooled" basis, while returning the money to employers in a selective, or targeted fashion. *See* Metzger, "Buying the Job," VII *Labor Research Review* 51, 53-54 (Fall 1988)([E]ach working electrician is losing 60 cents an hour and that money is going out of his/her pocket and into the pocket of a contractor.").

The unions' job targeting programs have become widespread and have had significant economic impact in some parts of the country. The programs have resulted in the redistribution of millions of dollars from union workers to selected union contractors, including the rebate of wages paid to employees on state-funded projects covered by prevailing wage laws. For example, the job targeting program giving rise to the Ohio case has allowed the United Association of the Plumbers and Pipefitters of Industry of the United States and Canada Local 189 ("Local 189") to distribute over

$450,000 annually in targeting funds. *See also* "Market Recovery Fund Works!," IBEW J., at 23 (Aug. 1993) (stating that local union's job targeting program was responsible for securing over $74,000,000 in construction work).

ABC members often bid against union contractors on public projects but are incapable of artificially deflating their own labor costs through a rebate mechanism. In 1989, ABC first challenged the application of job targeting programs under the federal Davis-Bacon Act. That proceeding ultimately led to the D.C. Circuit's holding in *Building and Construction Trades Dep't, AFL-CIO v. Reich*, 40 F.3d 1275 (D.C. Cir. 1995). The D.C. Circuit agreed with ABC and the U.S. Department of Labor that job targeting dues assessments, to the extent that they returned portions of public works prevailing wages from employees to employers, violated the Davis-Bacon Act. The D.C. Circuit's analysis and holding then were reaffirmed by the Ninth Circuit in *IBEW, Local 357 v. Brock*, 68 F.3d 1194 (9th Cir. 1995). *See also Associated Builders and Contractors, Inc., Golden Gate Chapter v. Local 302, IBEW*, 109 F. 3d 1353 (9th Cir. 1997), where the U.S. Court of Appeals for the Ninth Circuit declined to rule that state law claims challenging job targeting programs' compliance with prevailing wage laws were preempted by Section 301 of the LMRA.

Following *Reich* and *Brock*, it is clear that job targeting programs violate federal prevailing wage laws where they involve the rebate of wages paid on publicly funded projects back unionized employers. This is not to say that the federal court holdings invalidate all job targeting programs. Rather, the courts have only restricted the funding of job targeting programs so that they do not cause the unlawful rebate of employee wages from projects covered by a prevailing wage law. This is all that the Petitioner requested from the Ohio Supreme Court in the present case.

Given the substantive similarities between Davis-Bacon and the "Little Davis-Bacon" statutes of the several states, there appears little doubt that job targeting programs, to the

extent they are funded by rebates from wages paid on public projects, run afoul of state prevailing wage laws as well. *See Int'l Broth. of Elec. Workers v. Aubry* (Cal. App. 1996) 41 Cal. App. 4th 1632, 49 Cal. Rptr. 2d 759 (job targeting deduction held not to constitute union "dues" for purposes of enforcing state's prevailing wage law.). Unions have attempted to avoid this compelling logic and protect their labor-cost shell game by suggesting that the NLRA preempts states from enforcing their prevailing wage laws. In this regard, they have relied on an NLRB finding that does not address minimum wage requirements but merely holds that job targeting as a general matter is protected conduct under the NLRA. *See Manno Electric, Inc.*, 321 NLRB 278, 298 (1996).

The issue of NLRA preemption of state prevailing wage laws thus remains unresolved and in dire need of guidance from this Court as evidenced by the recent decision of the Supreme Court of Ohio. In reaching its conclusion that state prevailing wage laws are preempted, the Ohio court contravened the established jurisprudence of this Court and the circuit courts. Moreover, the Ohio decision establishes an anomalous dichotomy—unions are foreclosed from rebating wages earned on ***federal*** projects under Davis-Bacon, but are free to rebate wages earned on ***state*** projects notwithstanding the states' desire to enforce minimum labor standards under their Little Davis-Bacon acts. This errant conclusion and conflict has national significance and requires resolution by this Court.

II. THE HOLDING OF THE SUPREME COURT OF OHIO CONFLICTS WITH THE DECISIONS OF THIS COURT AND THE CIRCUIT COURTS.

In attempting to address the issue of whether states may maintain minimal labor standards in light of the preemptive effect of the NLRA, the decision of the Supreme Court of Ohio has misapprehended the established jurisprudence of this Court and the circuit courts. The decision of the Supreme Court of Ohio eviscerates the right of Ohio, and by

implication the many other states with prevailing wage laws, to exercise police power and establish minimum labor standards of general applicability. In doing so, the court has broadly expanded without justification the preemptive effect of the NLRA.

A. The Supreme Court Of Ohio Erred In Finding All State Regulation Of Job Targeting Programs To Be Preempted By Virtue Of The *Manno Electric* NLRB Decision.

The Supreme Court of Ohio erred in artificially truncating its preemption analysis in concluding that, because the NLRB generally has deemed job targeting programs to be protected conduct under Section 7 of the NLRA, state laws affecting job targeting programs are necessarily preempted. Applying a *Garmon* preemption analysis, *see San Diego Bldg. Trades Council v. Garmon*, 359 U.S. 236 (1959), the court stated that, "[b]ecause the NLRB has held that job targeting is actually protected by the NLRA, there is no room for state regulation infringing that conduct." Pet. App. at 17a. This holding simply is erroneous and unduly expands the NLRB's holding in *Manno Electric*.

It is uncontroverted that the NLRB in *Manno Electric*, 321 NLRB 278 (1996), stated that a union's use of a job targeting program is protected under Section 7 of the NLRA. *Id.* at 298. However, that case did not address a challenge to a job targeting program based upon a violation of a state prevailing wage law; rather, the Board considered only whether job targeting programs were *lawful* under the NLRA and state antitrust laws. The distinction is not one of mere factual dissimilarity as suggested by the Supreme Court of Ohio, Pet. App. at 17a; rather, it is one of central legal significance insofar as the Ohio court would apply *Manno Electric*'s general statement to foreclose *any* degree of state regulation, no matter the factual or legal context. This conclusion is plainly contrary to law.

For example, it is beyond argument that union picketing and solicitation generally are lawful and "protected" conduct under Section 7 of the NLRA. *Longshoremen v. Ariadne Shipping Co.*, 397 U.S. 195 (1969). Notwithstanding this fact, it is equally certain that states may enforce trespass laws where the generally protected activity is carried out in such a manner as to violate the property rights of an employer. *See, e.g., Sears , Roebuck & Co. v. San Diego County District Council of Carpenters*, 436 U.S. 180, 206-07 (1978) (discussing the viability of state trespass actions with regard to union picketing and solicitation). Thus, the Supreme Court of Ohio's application of talismanic significance to the NLRB's indication that job targeting programs are lawful begs the preemption question. The Ohio court has improperly ignored the more pointed issue of whether job targeting programs ***which violate prevailing wage laws*** may be subject to state regulation, just as pickets which violate state trespass laws may be subject to state regulation.

The Supreme Court of Ohio highlighted the deficiency of its analysis and presumption of "actually protected" status for ***any and all*** job targeting programs with its referencing of the *Sears* decision. The Ohio court noted this Court's recognition in *Sears* that "[p]rior to granting any relief for trespass . . . , the state court would have to decide that ***the trespass*** was not actually protected by federal law." Pet. App. at 18a (citing *Sears*, 436 U.S. at 201). The general status of picketing as lawful, protected conduct under Section 7 was not dispositive of the protected status of the particular conduct at issue in *Sears*, however. Rather, the Court looked to the ***specific circumstances*** of the picketing and whether the controversy was the same as or different from that which could be presented to the NLRB, in order to determine whether the union's particular conducted was "actually protected."

Incongruously, the Supreme Court of Ohio did not require itself to enter such a pointed inquiry with regard to a job targeting program's facial violation of Ohio's prevailing wage law prior to denying relief to Petitioner Croson. The

Ohio court's acceptance of the *Manno Electric* decision as a blanket bar to any state regulation artificially truncated its preemption analysis.[1] When fully examined, it is clear that, under the precedents of this Court and the circuit courts, job targeting programs are not exempted wholly from state authority, and the states may enforce their minimum labor standards.

B. No Authority Requires Preemption Of Ohio's Prevailing Wage Law; Rather, The Law Should Be Enforced Against Job Targeting Programs Which Are Funded Through Unlawful Rebates Of Prevailing Wages Paid On State-Funded Projects.

In halting its analysis with the *Manno Electric* "protected conduct" label, the Ohio high court failed to address the salient issue before the Court—whether Ohio, and the several states which have enacted prevailing wage laws, may require that job targeting programs, notwithstanding their generally protected status, avoid undermining minimum labor standards. This distinction and its import are conclusively demonstrated by federal cases restricting job targeting programs where they resulted in violations of the Davis-Bacon Act. *Building and Construction Trades Dep't, AFL-CIO v. Reich*, 40 F.3d 1275 (D.C. Cir. 1995); *IBEW, Local 357 v. Brock*, 68 F.3d 1194 (9th Cir. 1995).[2] There as here,

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[1] For example, under the Ohio analysis, a union even would be capable of establishing a job targeting program in which their members wages were reduced below Ohio's minimum wage, given that the minimum wage law would be an impermissible state regulation of an "actually protected" job targeting program.

[2] More recently, in *Associated Builders and Contractors, Inc., Golden Gate Chapter v. Local 302, IBEW*, __ F. 3d __, 154 LRRM 2871 (9th Cir. March 27, 1997), the U.S. Court of Appeals for the Ninth Circuit rejected the contention that state law claims challenging job targeting programs' compliance with prevailing wage laws were

the unions and unionized contractors argued that the NLRB had authorized job targeting deductions and that such deductions were permitted under Section 302 of the LMRA.

The *Reich* and *Brock* courts did not find it necessary to agree or disagree with the unions' contentions. The courts simply found them to be irrelevant to the separate inquiry of whether job targeting should be permitted to undermine the minimum labor standards of a prevailing wage law. As the D.C. Circuit stated: "Nothing in the interpretation of similar terms in the NLRA and the LRMA establishes that [the Department of] Labor's interpretation of the Davis-Bacon Act is unreasonable or of its own regulation is plainly erroneous." *Reich*, 40 F. 3d at 1282. The Ninth Circuit likewise "rejected union contentions that interpretations of the term "periodic dues," taken from the National Labor Relations Act context, are relevant in determining whether job targeting program assessments are "membership dues" under Davis-Bacon Act regulations." *Brock*, 68 F. 3d at 1197.

The same holding applies to the present case and properly led Ohio's Fourth Appellate District to find no federal preemption of the state's Prevailing Wage Law. The question of job targeting's ***legality*** under the federal or state statutes is not before the Court. The sole question is whether the state is entitled to maintain its traditional minimum labor standards and to expect unionized contractors and unions to comply therewith.[3]

(Footnote continued from previous page.)

preempted by Section 301 of the LMRA. The court did not reach other preemption theories, but nevertheless concluded that state law claims relating to job targeting and prevailing wage laws could be resolved independently of and without interpreting the job targeting agreements themselves. *Id.*, 154 LRRM at 2874.

[3] The Ohio Supreme Court's decision also conflicts with the decision of the California appellate court in *Int'l Broth. of Elec. Workers v. Aubry* (Cal. App. 1996) 41 Ca. App. 4th 1632, 49 Cal. Rptr. 2d 759 (job targeting deduction held not to constitute union "dues" for purposes of enforcing state's prevailing wage law).

Given the precedents of this Court recognizing the states' right to enact and enforce laws creating a "backdrop" upon which the federally controlled labor management relations may develop, it is clear that a state is entitled to enforce its Prevailing Wage Law. Moreover, the recent case law of the circuit courts affirms the states' rightful expectation that job targeting programs will be operated in a manner which complies with the long standing exercise of the state's minimum police power.

C. Prevailing Wage Laws Are An Exercise Of Historic Police Power Of The State To Establish And Enforce Minimum Employment Standards Of General Application.

Ohio's Prevailing Wage Law, enacted in 1931, predates the National Labor Relations Act. This Court has recognized that states "possess broad authority under their police powers to regulate the employment relationship to protect workers within the State," including "minimum and other wage laws." *Metropolitan Life Ins. Co. v. Commonwealth of Massachusetts*, 471 U.S. 724, 751 (1985) (quoting *DeCanas v. Bica*, 414 U.S. 351, 356 (1976)). Similarly, the Supreme Court of Ohio has declared the Prevailing Wage Law to be a traditional and sovereign exercise of general police power which "affect[s] the public health, safety, morals and general welfare and ha[s] a uniform application." *State ex rel. Evans v. Moore*, 431 N.E.2d 311, 314 (1982)(Brown, J., concurring); *see also Harris v. Van Hoose*, 550 N.E.2d 461, 462 (1990).

The Ohio Supreme Court's failure to recognize the state's authority to enforce its traditional prevailing wage laws in the face of federal preemption claims conflicts directly with this Court's recent decision in *California Division of Labor Standards Enforcement v. Dillingham Construction, N.A., Inc.*, 117 S. Ct. 832 (1997). In that case, the Court considered for the first time a claim that a state's prevailing wage law was preempted by federal labor law. The federal labor statute involved in *Dillingham* was ERISA, 29 U.S.C. § 1144, a law

which contains an explicit provision "conspicuous for its breadth" in preempting state laws. 117 S. Ct. at 837.

Notwithstanding the broad scope of ERISA preemption,[4] the Court in *Dillingham* refused to find federal preemption of state prevailing wage laws, absent factors not pertinent here. The Court reaffirmed the principle that "where federal law is said to bar state action in fields of traditional state regulation . . . we have worked on the assumption that ***the historic police powers of the States were not to be superseded*** by the Federal Act unless that was the clear and manifest purpose of Congress." *Id.* at 838 (quoting *New York State Conference of Blue Cross & Blue Shield Plans v. Travelers Ins. Co.*, 115 S. Ct. 1671, 1677 (1995) and *Rice v. Santa Fe elevator Corp.*, 331 U.S. 218, 230 (1947)) (emphasis added).

The Court specifically found that state prevailing wage laws embody long standing traditional exercise of state police powers (as found by the Fourth Appellate District here), and that "we are reluctant to alter our ordinary assumption that the historic police powers of the States were not to be superseded by the Federal Act." *Dillingham*, 117 S. Ct. at 838. Finding that California's state prevailing wage law was "no different from myriad state laws in areas traditionally subject to local regulation, which Congress could not possibly have intended to eliminate," *Id.* at 842, the Supreme Court found the prevailing wage law not to be preempted, even by the broadest of federally preemptive labor laws.

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[4] ERISA's preemptive effect on state laws is unquestionably broader than that of the NLRA. Whereas the NLRA contains no express provision preempting state laws, ERISA explicitly preempts all "related" state laws in the broadest possible terms. For this reason, in several cases prior to *Dillingham* involving state prevailing wage laws challenged under both the NLRA and ERISA, courts had found the state laws to be preempted by ERISA but not by the NLRA. *See, e.g., General Electric v. New York Dep't of Labor*, 891 F.2d 25, 27-28 (2d Cir. 1989).

Ironically, several of the amici who supported the Respondents' position before the Supreme Court of Ohio were the strongest proponents of the outcome in *Dillingham*, and they have also been the strongest advocates of state prevailing wage laws in general, when it has suited their interests. In particular, the Building and Construction Trades Department, AFL-CIO, along with other unions and unionized contractors, wrote vigorous briefs to the Supreme Court in *Dillingham*, ***opposing*** federal preemption of state prevailing wage laws.

The reason for the role reversal is clear. In the past, unions and unionized contractors have sought to use prevailing wage laws as a shield against lower cost non-union competition; but in the present case, the same parties are seeking to defend a "market recovery" tactic by which they themselves are seeking to redistribute employee wages to select contractors in facial violation of the Prevailing Wage Law. As the federal courts found in *Reich* and *Brock*, the Fourth Appellate District rightly discerned that the state's enforcement of its minimum labor standards should apply equally to both unionized and non-union contractors. The Ohio Supreme Court erred in reversing that finding.

The Respondents should not be allowed to evade their obligations under the Prevailing Wage Law, which establishes neutral, minimum labor standards applicable to ***all*** construction employees on public works, just as they may not exempt themselves from state trespass laws. While both types of state laws may minimally influence conduct generally protected by the NLRA, "there is no suggestion in the legislative history of the [NLRA] that Congress intended to disturb the myriad state laws then in existence that set minimum labor standards." *Metropolitan Life Ins. Co.*, 471 U.S. at 756. The prevailing wage standards at issue merely constitute a traditional exercise of state police power, which Congress has expressed no intention to preempt on behalf of unionized contractors and which serve as a lawful "backdrop" to the collective bargaining process. *See Metropolitan Life*

Ins., 471 U.S. 724 (1985) (upholding against NLRA preemption state minimum standards regarding insurance coverage); *Fort Halifax Packing Co., Inc. v. Coyne*, 482 U.S. 1 (1987)(same).

CONCLUSION

For the reasons stated above and in the brief of Petitioner J.A. Croson, this Court should grant a writ of certiorari to the Supreme Court of Ohio and determine the merits of Petitioner's appeal.

Respectfully submitted,

Maurice Baskin*
David R. Warner
Venable, Baetjer, Howard & Civiletti, LLP
1201 New York Ave., N.W.
Washington, D.C. 20005
202-962-4800
202-962-8300 (fax)

Counsel for Associated Builders and Contractors, Inc. as *Amicus Curiae*

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No. 98-89

IN THE
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OCTOBER TERM, 1998

J.A. CROSON COMPANY,
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v.
J.A. GUY, INC., *et al.*,
Respondents.

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RESPONDENT UNITED ASSOCIATION OF JOURNEYMEN AND APPRENTICES OF THE PLUMBING AND PIPE FITTING INDUSTRY OF THE UNITED STATES AND CANADA, AFL-CIO, LOCAL NO. 189's BRIEF IN OPPOSITION TO CERTIORARI

N. VICTOR GOODMAN
Counsel of Record
MARK D. TUCKER
REX A. LITTRELL
BENESCH, FRIEDLANDER,
COPLAN & ARONOFF LLP
88 East Broad Street
9th Floor
Columbus, Ohio 43215
(614) 223-9343

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

QUESTION PRESENTED

Whether the Ohio Supreme Court correctly determined that federal law preempts a non-union contractor's attempt to use its misconstruction of Ohio's prevailing wage law "to restrain or inhibit" a union's federally protected operation of its "job targeting program?"

LISTING OF ADDITIONAL PARTIES

Respondents

United Association of Journeymen and Apprentices of the Plumbing and Pipe Fitting Industry of the United States and Canada, AFL-CIO, Local No. 189.

TABLE OF CONTENTS

	Page
QUESTION PRESENTED	i
LISTING OF ADDITIONAL PARTIES	ii
TABLE OF AUTHORITIES	v
CONSTITUTIONAL, STATUTORY, AND OTHER PROVISIONS INVOLVED	2
STATEMENT OF THE CASE	2
REASONS WHY THE PETITION SHOULD BE DENIED	8
I. INTRODUCTION	8
II. THE OHIO SUPREME COURT'S DECISION IS CORRECT	9
III. THE DECISION BELOW IS NOT IN CONFLICT WITH ANY DECISION OF THIS COURT OR THAT OF ANY FEDERAL COURT OF APPEALS	13
IV. THE OHIO SUPREME COURT CORRECTLY DETERMINED THAT *MACHINISTS* PREEMPTION EXCEPTIONS DO NOT APPLY WHEN DETERMINING WHETHER A STATE LAW CLAIM IS PREEMPTED UNDER *GARMON*	16
V. CROSON'S CLAIM HAS NO APPLICATION BEYOND THE PARTICULAR OHIO STATUTE AND ADMINISTRATIVE REGULATION AT ISSUE HEREIN	18
CONCLUSION	20

TABLE OF CONTENTS—Continued

APPENDIX Page

29 U.S.C. § 157 ..... 1a

R.C. 4115.07 ..... 1a

R.C. 4115.10 ..... 2a

Ohio Adm. Code § 4101:9-4-07 ..... 5a

TABLE OF AUTHORITIES

Cases Page

Brown v. Hotel & Restaurant Employees & Bartenders Internatl. Union Local 54, 468 U.S. 491 (1984) 12

Building and Constr. Trades Council of the Metro. Dist. v. Associated Builders and Contractors of Mass./R.I., Inc., 507 U.S. 218 (1993) 9, 10

Building and Constr. Trades Dep't v. Reich, 40 F.3d 1275 (D.C.Cir. 1994) 13, 14, 15

California Div. of Labor Standards Enforcement v. Dillingham Constr., N.A., Inc., 519 U.S. 316 (1997) 13, 14

Connell Constr. Co. v. Plumbers & Steamfitters Local Union No. 100, 421 U.S. 616 (1975) 14, 15

Independent Elec. Contractors of Greater Cincinnati, Inc. v. County of Hamilton, 101 Ohio App.3d 580, 656 N.E.2d 18, *jurisdictional motion overruled*, 73 Ohio St.3d 1410, 651 N.E.2d 1308 (1995) 6

International Bhd. of Elec. Workers, Local 11 v. Aubry, 41 Cal.App.4th 1632, 49 Cal.Rptr.2d 759 (1996) 15, 16

International Bhd. of Elec. Workers v. Brock, 68 F.3d 1194 (9th Cir. 1995) 13, 14, 15

J.A. Croson Co. v. Central Ohio Joint Vocational School Dist., 104 Ohio App.3d 146, 661 N.E.2d 250, *jurisdictional motion overruled*, 74 Ohio St.3d 1418, 655 N.E.2d 738 (1995), *cert. denied*, 517 U.S. 1155 (1996) 6

Lodge 76, Int'l Ass'n of Machinists and Aerospace Workers v. Wisconsin Employment Relations Comm'n, 427 U.S. 132 (1976) 10, 16, 17

Manno Elec., Inc., 321 NLRB 278, 153 LRRM 1107 (1996) 7, 11, 13, 14

Metropolitan Life Ins. Co. v. Massachusetts, 471 U.S. 724 (1985) 9, 14, 16, 17

San Diego Building Trades Council v. Garmon, 359 U.S. 236 (1959) 9, 10, 13, 14, 17

Sears, Roebuck & Co. v. San Diego County Dist. Council of Carpenters, 436 U.S. 180 (1978) 12, 13

TABLE OF AUTHORITIES—Continued

Statutes Page

29 U.S.C. § 151 14
29 U.S.C. § 157 ..... 8, 11
29 U.S.C. § 411(a) (3) 2
29 U.S.C. § 1144 13
40 U.S.C. § 276a 14
R.C. Chapter 4115 4
R.C. 4115.03 4
R.C. 4115.07 ..... 4, 5, 18
R.C. 4115.10(D) 4, 5, 8, 14, 18, 19

Other

Ohio Adm. Code § 4101:9-4-07 ..... 5, 6, 14, 18
Ohio Adm. Code § 4101:9-4-07(A) (1) 19
Ohio Adm. Code § 4101:9-4-07(B) (6) 18, 19
Advice Memorandum. International Bhd. of Elec. Workers, Local 82 (Wagner-Smith Co.), Nos. 9-CA-30588, 9-CB-8493, 9-CB-8511 (July 8, 1993) 15, 19

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RESPONDENT UNITED ASSOCIATION OF JOURNEYMEN AND APPRENTICES OF THE PLUMBING AND PIPE FITTING INDUSTRY OF THE UNITED STATES AND CANADA, AFL-CIO, LOCAL NO. 189's BRIEF IN OPPOSITION TO CERTIORARI

Respondent United Association of Journeymen and Apprentices of the Plumbing and Pipe Fitting Industry of the United States and Canada, AFL-CIO, Local Union 189 ("Local 189") respectfully requests that this Court deny the petition for a writ of certiorari seeking review of the Ohio Supreme Court's decision in this case. The Ohio Supreme Court's opinion is reported at 81 Ohio St.3d 346, 691 N.E.2d 655 (1998), and is reproduced in the appendix to the Petition at 1a.

CONSTITUTIONAL, STATUTORY, AND OTHER PROVISIONS INVOLVED

The Petitioner fails to fully set out the relevant portions of the Ohio statutory and administrative code provisions involved in this case. For the Court's convenience, 29 U.S.C. § 157, R.C. 4115.07 and 4115.10, and Ohio Adm. Code § 4101:9-4-07 are, therefore, set forth in their entirety in the appendix hereto.

STATEMENT OF THE CASE

On May 28, 1988, Local 189 established the "Plumbers and Pipe Fitters Local 189 Industry Advancement Program" to finance what is generally known in the construction industry as a "job targeting program." Local 189's Industry Advancement Program was designed to promote the organized mechanical construction industry within Local 189's jurisdiction by assisting signatory union contractors in competing for contracts, and thereby further the union's legitimate goal of providing increased employment opportunities for its members.

Like most job targeting programs, Local 189's Industry Advancement Program was funded solely by union members through voluntary union dues. By majority secret ballot vote, Local 189 members increased their dues to three and three-quarters percent (3¾%) of their gross wages, two percent (2%) of which was to be placed in the union's Industry Advancement Fund. Like all of Local 189's membership dues, the two percent (2%) job targeting dues are subject to approval by periodic secret ballot and are withheld from members' wages pursuant to voluntary dues check-off authorizations executed by each member. See 29 U.S.C. § 411(a)(3). The Industry Advancement Program is financed exclusively with union dues, and no contractor is permitted to, or ever has, deposited any of its own money into the fund.

Local 189's Industry Advancement Program is operated exclusively by Local 189 to benefit its members, not con-

tractors. No contractor, or association of contractors, has any control over any portion of Local 189's membership dues or the operation of the job targeting program. The amount of dues, the purposes for which such dues are used, and the Industry Advancement Program are not subjects of collective bargaining between the Local 189 and its signatory contractors.

Although signatory contractors may suggest that particular jobs be "targeted," Local 189 makes such determinations in its sole and absolute discretion. Contractors have no guarantee that they will ever receive any monies from Local 189's Industry Advancement Fund or that they will ever work on a "targeted" job. In considering whether to target a particular job, Local 189 asks one or more signatory contractors to estimate the number of hours of labor within Local 189's work jurisdiction necessary to complete the job. If Local 189 determines to target a particular job, it notifies all signatory contractors of its decision and the amount of the job targeting grant devoted to the project, normally stated as a set amount per hour of labor up to a maximum number of hours. All signatory contractors may then use this information in preparing and submitting a bid for the project.

If any signatory contractor is awarded the contract, Local 189 and that contractor enter into a "Memorandum of Market Recovery Agreement." The contractor is required at all times to pay all of its employees the wages and benefits required by the collective bargaining agreement. Pursuant to certified payroll reports provided by the contractor to Local 189 for the targeted job, the union then pays the contractor an amount equal to the number of hours worked times the targeted rate.

Respondent J.A. Guy, Inc. ("J.A. Guy") is, and at all times relevant herein was, signatory to the collective bargaining agreement between Local 189 and the Mechanical Contractors Association of Central Ohio. Pursuant to dues check-off authorization forms signed by all of its em-

ployees engaged in the plumbing and pipe fitting trades, J.A. Guy withheld three and three-quarters percent (3¾%) of its employees wages as union dues. Those dues were transmitted to Local 189 through its health and welfare fund. J.A. Guy withheld such dues for its employees on all jobs, targeted and non-targeted.

In 1990 and 1991, J.A. Guy and Petitioner J.A. Croson Company ("Croson") submitted bids for two separate contracts for the Pickaway County Jail and its water softening system. Because both contracts were for "construction" of a "public improvement" for a "public authority," see R.C. 4115.03, they were subject to Ohio's prevailing wage law, R.C. Chapter 4115. J.A. Guy submitted the low bid for both projects, and consequently was awarded both contracts.[1] During the course of both projects, J.A. Guy deducted from its employees' wages three and three-quarters percent (3¾%) union membership dues and transmitted those dues to Local 189.

On June 15, 1993, Croson commenced the present action against J.A. Guy asserting that J.A. Guy's withholding of two percent (2%) of its employees' wages violated Ohio's prevailing wage law, and specifically R.C. 4115.07 and 4115.10(D). Those sections provide, in relevant part:

> All contractors and subcontractors required by sections 4115.03 to 4115.16 of the Revised Code, and the action of any public authority to pay not less than the prevailing rate of wages shall make full payment of such wages in legal tender, without any deduction for food, sleeping accommodations, transportation, use of small tools, or any other thing of any kind or description. This section does not apply where the employer and employee enter into an agreement in writing at the beginning of any term of employment covering deductions for food, sleeping

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[1] The jail project was "targeted," and the water softening system project was not.

> accommodations, or other similar item, provided such agreement is submitted by the employer to the public authority fixing the rate of wages and is approved by such public authority as fair and reasonable. * * *

R.C. 4115.07.

> Where persons are employed and their rate of wages has been determined as provided in section 4115.04 of the Revised Code, no person, either for self or any other person, shall request, demand, or receive, either before or after the person is engaged, that the person so engaged pay back, return, donate, contribute, or give any part or all of the person's wages, salary, or thing of value, to any person, upon the statement, representation, or understanding that failure to comply with such request or demand will prevent the procuring or retaining of employment, and no person shall, directly or indirectly, aid, request, or authorize any other person to violate this section. *This division does not apply to any agent or representative of a duly constituted labor organization acting in the collection of dues or assessments of such organization.*

R.C. 4115.10(D) (emphasis added).[2]

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[2] Without any elliptical indication, Croson omitted the italicized sentence—language that is central to its claim in this case—from the text of the statutory provisions set forth in its Petition. See Petition at 2-3. In its complaint, Croson also alleged that J.A. Guy's withholding of Local 189 members' dues violated Ohio Adm. Code § 4101:9-4-07, which Croson also failed to set out verbatim as required by this Court's rules. That section provides, in pertinent part:

> (A) The following deductions from wages may be made without application to and approval of the bureau:
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> (1) *Any deduction from wages required by federal, state, or local law;*
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> * * *
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> (B) The following deductions from wages may be made only if, prior to commencement of work by the employee on any

Croson's complaint challenged only J.A. Guy's withholding of job targeting dues from its employees' wages. Croson did not allege that Local 189's targeting of the jail project, or any other project, violated the prevailing wage law. Nor did Croson assert that the job targeting program itself violated any state or federal law.[3]

On March 28, 1995, the Court of Common Pleas for Pickaway County, consistent with two well-reasoned Ohio appellate court decisions, entered summary judgment ruling that Croson's claim was preempted by federal labor law. App. at 80a. See *Independent Elec. Contractors of Greater Cincinnati, Inc. v. County of Hamilton*, 101 Ohio App.3d 580, 656 N.E.2d 18, *jurisdictional motion overruled*, 73 Ohio St.3d 1410, 651 N.E.2d 1308 (1995), and *J.A. Croson Co. v. Central Ohio Joint Vocational School Dist.*, 104 Ohio App.3d 146, 661 N.E.2d 250, *jurisdictional motion overruled*, 74 Ohio St.3d 1418, 655 N.E.2d 738 (1995), *cert. denied*, 517 U.S. 1155 (1996). On October 4, 1996, the Court of Appeals for Pickaway County, Fourth Appellate District, reversed. App. at 24a. Local 189 and J.A. Guy thereafter timely appealed to the Ohio Supreme Court.

The Court of Appeals subsequently certified its decision to the Ohio Supreme Court as in conflict with the

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project, employers procure and maintain, in writing, proof of voluntary deductions signed by the employee:

* * *

(6) Any deductions to pay regular union initiation fees and membership dues, not including fines or special assessments, provided that a collective bargaining agreement between the employer and representatives of its employees permits such deductions and such deductions are not otherwise prohibited by law.

* * *

Ohio Adm. Code § 4101:9-4-07 (emphasis added).

[3] J.A. Guy denied liability, but filed a third-party complaint against Local 189 asserting that, to the extent it was held liable, Local 189 was responsible for that liability.

two prior Ohio appellate decisions addressing the issue. On January 29, 1997, the Ohio Supreme Court accepted Local 189's and J.A. Guy's discretionary appeals, *J.A. Croson Co. v. J.A. Guy, Inc.*, 77 Ohio St.3d 1547, 674 N.E.2d 1186 (1997), and further ruled that a conflict between appellate decisions indeed existed. *J.A. Croson Co. v. J.A. Guy, Inc.*, 77 Ohio St.3d 1546, 674 N.E.2d 1185 (1997). The Court directed the parties to brief the following question:

> Whether federal labor law preempts a claim that a union employer's deduction of union dues for a union "Industry Advancement" or "job targeting" fund violates Ohio's Prevailing Wage Law, R.C. 4115.01, *et seq.*, and state regulations adopted thereunder.

J.A. Croson Co. v. J.A. Guy, Inc., 77 Ohio St.3d at 1546, 674 N.E.2d at 1185.

On April 8, 1998, the Ohio Supreme Court unanimously answered the certified question in the affirmative and reversed the decision of the Court of Appeals for Pickaway County. *J.A. Croson Co. v. J.A. Guy, Inc.*, 81 Ohio St 3d 346, 691 N.E.2d 655, App. at 1a (1998).

Significantly, the Ohio Supreme Court did not rule that any Ohio statute or administrative regulation was preempted by federal labor law. Rather, the Ohio Court merely held that Croson's claim, which Local 189 maintains was based upon a strained construction of the statute and rules, was preempted. In the Ohio Supreme Court's words, "[i]n light of the NLRB's holding in *Manno*, Section 7 of the NLRA preempts state regulation under Ohio Adm. Code 4101:9-4-07(B)(6) and R.C. 4115.10(D) *to the extent that those provisions could be construed* to restrain or inhibit the federally protected use of job targeting programs." *J.A. Croson Co.*, 81 Ohio St.3d at 358, 691 N.E.2d at 665, App. at 22a (citing *Manno Elec., Inc.*, 321 NLRB 278, 153 LRRM 1107 (1996)) (emphasis added) (footnote omitted).

Croson thereafter timely petitioned this Court for a writ of certiorari to the Ohio Supreme Court.

REASONS WHY THE PETITION SHOULD BE DENIED

I. INTRODUCTION.

The unanimous decision of the Ohio Supreme Court carefully traced the full body of this Court's decisions concerning preemption under § 7 of the National Labor Relations Act ("NLRA"), 29 U.S.C. § 157. In its petition, Croson has failed to establish any error in the Ohio Supreme Court's preemption analysis or with its narrow, pointed ruling.

Importantly, the Ohio Supreme Court did not rule that any Ohio statute or administrative regulation was preempted by federal law. Rather, the Court simply ruled that to the extent Croson's claim required a certain construction be imposed upon Ohio's statute and regulations, that construction was preempted by federal labor law.[4] Thus, the decision of the Ohio Supreme Court has no effect beyond the particular Ohio statute and regulation at issue herein. Croson has advised this Court of no litigation anywhere else in the nation raising this, or a similar, issue under a state statute or regulation substantially similar to Ohio's. In the absence of any indication that the Ohio Supreme Court's decision will have any effect outside of the particular facts and circumstances of

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[4] The construction advanced by Croson has never been adopted by any Ohio court. For Croson's construction to prevail, the final sentence of R.C. 4115.10(D) ("This division does not apply to any agent or representative of a duly constituted labor organization acting in the collection of dues or assessments of such organization.") would have to be read out of the statute. Perhaps this is what motivated Croson to omit this sentence from its "verbatim" reproduction of R.C. 4115.10(D) in its Petition. Unless and until the General Assembly takes this unlikely action, Croson could not succeed on the merits of its claim. This case, therefore, has very little impact beyond this particular lawsuit.

Croson's claim and Ohio's statute and regulation, this case does not warrant this Court's full review.

II. THE OHIO SUPREME COURT'S DECISION IS CORRECT.

The Ohio Supreme Court's decision in this case is a clear, textbook analysis of NLRA preemption as set forth in this Court's decision in *San Diego Building Trades Council v. Garmon*, 359 U.S. 236 (1959), and its progeny. Croson has failed to demonstrate that the Ohio court misapplied any of this Court's decisions. Accordingly, this Court should deny review of the Ohio Supreme Court's decision.

> The Court has articulated two distinct NLRA pre-emption principles. The so-called *Garmon* rule, see *San Diego Building Trades Council v. Garmon*, 359 U.S. 236 (1959), protects the primary jurisdiction of the NLRB to determine in the first instance what kind of conduct is either prohibited or protected by the NLRA.
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> A second pre-emption doctrine protects against state interference with policies implicated by the structure of the Act itself, by pre-empting state law and state causes of action concerning conduct that Congress intended to be unregulated. The doctrine was designed, at least initially, to govern pre-emption questions that arose concerning activity that was neither arguably protected against employer interference by §§ 7 and 8(a)(1) of the NLRA, nor arguably prohibited as an unfair labor practice by § 8(b) of that Act. 29 U.S.C. §§ 157, 158(a)(1) and (b). Such action falls outside the reach of Garmon pre-emption.

Metropolitan Life Ins. Co. v. Massachusetts, 471 U.S. 724, 748-49 (1985).[5] See also *Building and Constr.*

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[5] As discussed below, see *infra* at 16-17, Respondents have never asserted that Croson's claim was preempted under the second of

Trades Council of the Metro. Dist. v. Associated Builders and Contractors of Mass./R.I., Inc., 507 U.S. 218, 224-26 (1993).

The Ohio Supreme Court faithfully applied the *Garmon* preemption doctrine, making only those distinctions made by this Court itself: (1) between *clearly* prohibited or protected activity and *arguably* prohibited or protected activity, and (2) between prohibited conduct and protected conduct. *J.A. Croson Co.*, 81 Ohio St.3d at 352-54, 691 N.E.2d at 661-62, App. at 11a-15a. Croson challenges neither of these distinctions.

As this Court noted in *Garmon*, when the NLRB has decided that an activity is either protected or prohibited, federal law preempts all state jurisdiction to regulate that conduct:

> [w]hen it is clear or may fairly be assumed that the activities which a State purports to regulate are protected by § 7 of the [NLRA], or constitute an unfair labor practice under § 8, due regard for the federal enactment requires that state jurisdiction must yield. To leave the States free to regulate conduct so plainly within the central aim of federal regulation involves too great a danger of conflict between power asserted by Congress and requirements imposed by state law.

Garmon, 359 U.S. at 244.

The *Garmon* Court plainly articulated that "[i]f the Board decides, subject to appropriate federal judicial review, that conduct is protected by § 7, or prohibited by § 8, then the matter is at an end, and the States are ousted of all jurisdiction." *Id.* at 245. On the other hand, if it is not clear that a particular activity is either protected or prohibited, but is arguably so, then "courts are

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these two doctrines, the so-called *Machinists* preemption. See *Lodge 76, Int'l Ass'n of Machinists and Aerospace Workers v. Wisconsin Employment Relations Comm'n*, 427 U.S. 132 (1976). Accordingly, the "minimum labor standards" exception to *Machinists* preemption advanced by Croson is inapplicable.

not the primary tribunals to adjudicate such issues. It is essential to the administration of the Act that these determinations be left in the first instance to the National Labor Relations Board." *Id.* at 244-45.

As the Ohio Supreme Court correctly observed, the NLRB has concluded, in a decision subject to federal judicial review, that job targeting is an activity protected under § 7 of the NLRA:

> Section 7 provides that employees shall have the right "to engage in other concerted activities for the purpose of . . . other mutual aid and protection." The objectives of the "job targeting program" are to protect employee's jobs and wage scales. These objectives are protected by section 7.

Manno Elec., Inc., 321 NLRB 278, 153 LRRM 1107 (1996). Thus, under this Court's decision in *Garmon*, Local 189's establishment and maintenance of its job targeting program is "clearly," or "actually," protected activity. Accordingly, the Ohio Supreme Court reached the only conclusion it could—Croson's attempt to use the state prevailing wage law and Ohio courts to interfere with Local 189's job targeting program is preempted.[6]

Furthermore, the Ohio Supreme Court properly observed that federally "protected" activity implicates supremacy concerns to a greater degree than "prohibited" activity:

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[6] In its Petition, Croson incorrectly asserts that the Ohio Supreme Court held that "job targeting programs are *absolutely protected* by the NLRA . . . ." Petition at 13 (emphasis in original). Croson apparently attempts to leave this Court with the impression that the Ohio court held that "job targeting [is] some kind of absolute right," Petition at 29, and, therefore, immunized job targeting programs from all judicial review. The Ohio Supreme Court, however, held that job targeting programs are "actually" or "clearly" protected, not "absolutely" protected, see *J.A. Croson Co.*, 81 Ohio St.3d at 354-55, 691 N.E.2d at 662-63, App. at 16a-17a, and Croson's attempt to elevate the importance of the Ohio court's decision by the substitution of terms must fail.

> "Apart from notions of 'primary jurisdiction,' there would be no objection to state courts' and the NLRB's exercising concurrent jurisdiction over conduct *prohibited* by the federal Act." * * * *Sears, [Roebuck & Co. v. San Diego County Dist. Council of Carpenters,]* 436 U.S. [180] at 199-200 . . . [(1978)]. Considerations of federal supremacy, however, are implicated to a greater extent where conduct is protected under Section 7 of the NLRA. *Id.* Where conduct is protected, "[t]he danger of permitting local adjudications is not that timing or form of relief might be different from what the Board would administer, but rather that the local court might restrain conduct that is in fact protected by the Act."
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> Where state regulation would, in fact, inhibit federally protected activity, there is no need to invoke the primary-jurisdiction rationale set forth in *Garmon*. "The threshold question in every labor pre-emption case is whether the conduct with respect to which a State has sought to act is, or may fairly be regarded as, federally protected activity. Because conflict is the touchstone of pre-emption, such activity is obviously beyond the reach of all state power."

J.A. Croson Co., 81 Ohio St.3d at 353-54, 691 N.E.2d at 662, App. at 14a-15a (some citations omitted).[7] Because the activity it ultimately seeks to "thwart," *J.A. Croson Co.*, 81 Ohio St.3d at 355, 691 N.E.2d at 663, App. at 16a, is clearly *protected* activity, the Ohio Su-

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[7] The Ohio Supreme Court also observed that this Court "has 'frequently applied traditional pre-emption principles to find state law barred on the basis of an actual conflict with § 7. If employee conduct is protected under § 7, then state law which interferes with the exercise of these federally protected rights creates an actual conflict and is pre-empted by direct operation of the Supremacy Clause.' *Brown v. Hotel & Restaurant Employees & Bartenders Internatl. Union Local 54* (1984), 468 U.S. 491, 501 . . . ." *Id.* Local 189 has consistently argued throughout the proceedings in this case that Croson's claim was preempted under both *Garmon* and the Supremacy Clause.

preme Court properly determined that Croson's claim is preempted under the NLRA.[8]

III. THE DECISION BELOW IS NOT IN CONFLICT WITH ANY DECISION OF THIS COURT OR THAT OF ANY FEDERAL COURT OF APPEALS.

Croson argues that the decision of the Ohio Supreme Court in this case is in "direct conflict" with *California Div. of Labor Standards Enforcement v. Dillingham Constr., N.A., Inc.*, 519 U.S. 316 (1997), *Building and Constr. Trades Dep't v. Reich*, 40 F.3d 1275 (D.C. Cir. 1994), and *International Bhd. of Elec. Workers v. Brock*, 68 F.3d 1194 (9th Cir. 1995). See Petition at 9-11, 14-16. None of these cases, however, raised the narrow NLRA preemption question raised by this case, and none of the cited cases adverted to, much less decided, that NLRA preemption question.

Dillingham Constr., supra, involved preemption under the Employee Retirement Income Security Act of 1974, 29 U.S.C. § 1144. *Dillingham Constr.*, 519 U.S. at ——, 117 S.Ct. at 835. ERISA preemption requires a completely different analysis than NLRA preemption. Neither Local 189 nor J.A. Guy have ever asserted that R.C.

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[8] The most significant consequence of the NLRB's ruling in *Manno Elec.* that job targeting is, in fact, a "protected" activity is that it invalidates Croson's assertion that *Garmon* preemption does not apply because it could not present its precise claim to the NLRB. See Petition at 25-26. The Ohio Supreme Court, citing, *inter alia*, this Court's decision in *Sears, Roebuck & Co., supra*, correctly observed, however, that this exception to *Garmon* preemption does not apply when the NLRB has ruled that the conduct at issue is *actually protected*. *J.A. Croson Co.*, 81 Ohio St.3d at 356, 691 N.E.2d at 663-64, App. at 19a. See *Sears, Roebuck & Co.*, 436 U.S. at 202 ("We are therefore persuaded that *the primary jurisdiction rationale* does not provide a *sufficient* justification for pre-empting state jurisdiction over *arguably protected conduct* when the party who could have presented the protection issue to the Board has not done so and the other party to the dispute has no acceptable means of doing so.") (some emphasis added).

4115.10(D), Ohio Adm. Code § 4101:9-4-07, or Croson's claim are preempted under ERISA. Consequently, the Ohio Supreme Court's decision in this case, which addressed only NLRA preemption, cannot legitimately be said to conflict with this Court's decision in *Dillingham Constr.*[9]

Nor is the Ohio Supreme Court's decision in conflict with *Reich, supra*, or *Brock, supra.* Initially, *Garmon* preemption was neither raised nor addressed by the courts in *Reich* and *Brock*, and for the most straightforward reasons. Both decisions pre-date the NLRB's decision in *Manno Elec., supra*, which forms the basis of Respondents' assertion of *Garmon* preemption. It is disingenuous, therefore, to assert that those decisions somehow decide the precise question raised here.

Furthermore, both federal appellate decisions cited by Croson deal with the deduction of job targeting dues on *federal* public construction projects governed by the *federal* Davis-Bacon Act, 40 U.S.C. § 276a, *et seq.* See *Connell Constr. Co. v. Plumbers & Steamfitters Local*

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9 Nevertheless, Croson argues that if state prevailing wage laws are not preempted under ERISA's "broad" preemption provision, those laws also must not be preempted under the NLRA. Petition at 9-10, 14-16. This argument is doubly wrong.

First, Respondents have never asserted that Ohio's prevailing wage law itself is preempted, but rather only that Croson's particular claim here is preempted to the extent that it seeks to prohibit Local 189 from deducting dues permitted by the NLRA or to otherwise regulate Local 189's use of its union dues.

Second, ERISA and the NLRA are completely different animals enacted for different purposes. On the one hand, the fundamental purpose of the NLRA is to encourage collective bargaining and the industrial stability flowing therefrom. See NLRA § 1, 29 U.S..C § 151. On the other hand, the fundamental purpose of ERISA is to "comprehensively regulate[] employee pension and welfare plans." *Metropolitan Life Ins. Co.*, 471 U.S. at 728. Thus, it is neither surprising nor "inexplicable" that the Ohio Supreme Court refused to confuse the issue before it, *i.e., Garmon* preemption, by including irrelevant ERISA preemption decisions in its discussion.

Union No. 100, 421 U.S. 616, 635 (1975) (After holding that a union's agreement with a construction contractor was subject to federal anti-trust laws, the Court stated that "[t]he use of state anti-trust law to regulate union activities in aid of organization must . . . be preempted because it creates a substantial risk of conflict with policies central to federal labor law."). No state statute was before the *Reich* or *Brock* courts, and consequently, those courts did not reach the issue of federal preemption of a state law claim.[10]

Croson also cites the California Court of Appeals' decision in *International Bhd. of Elec. Workers, Local 11 v. Aubry*, 41 Cal. App. 4th 1632, 49 Cal. Rptr.2d 759 (1996), to support its non-preemption assertion. The decision in *Aubry*, however, does not support Croson's claim.

In *Aubry*, the state official vested with the responsibility to enforce California's prevailing wage law determined that the state prevailing wage rates did not include the amount of the employees' wages deposited into a job targeting program. California did not, as Croson's claim herein would have Ohio do, prohibit the deduction of job targeting dues. Significantly, the court in *Aubrey* noted that the California official "did not actually decide whether the job targeting rebates in question here could properly be excluded [from the definition of "general prevailing rate" under California statutes] . . . because he reasoned that such a decision might raise questions of preemption under federal law. . . ." *Aubry*, 41 Cal App. 4th at 1638, 49 Cal. Rptr.2d at 763. Accordingly, the court in *Aubry* expressly stated that "[w]e do not reach any issues arising solely under federal law, such as fed-

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[10] In an Advice Memorandum cited to the court below, the NLRB Division of Advice has agreed that *Reich* is not controlling in determining whether job targeting dues are "membership dues" under the NLRA. *Advice Memorandum, International Bhd. of Elec. Workers, Local 82 (Wagner-Smith Co.)*, Nos. 9-CA-30588, 9-CB-8493, 9-CB-8511 (July 8, 1993).

eral preemption issues, because they have not been briefed and are not properly before us here." *Aubry*, 41 Cal. App.4th at 1638 n.1, 49 Cal. Rptr.2d at 763 n.1. The decision in *Aubry* does not, therefore, support Croson's argument.

IV. THE OHIO SUPREME COURT CORRECTLY DETERMINED THAT *MACHINISTS* PREEMPTION EXCEPTIONS DO NOT APPLY WHEN DETERMINING WHETHER A STATE LAW CLAIM IS PREEMPTED UNDER *GARMON*

As noted above, this Court has articulated two distinct doctrines for NLRA preemption. The second of these doctrines, so-called *Machinists* preemption, prohibits state interference with "conduct that Congress intended to be unregulated" by the Act. *Metropolitan Life Ins. Co.*, 471 U.S. at 749. Because "[t]he NLRA is concerned primarily with establishing an equitable process for determining terms and conditions of employment, and not with particular substantive terms of the bargain that is struck when the parties are negotiating from relatively equal positions," *Metropolitan Life Ins. Co.*, 471 U.S. at 753, state statutes that "alter the balance of bargaining power between labor and management," *Id.* at 751, are preempted under the *Machinists* doctrine. This Court has made clear, however, that "state minimum labor standards" are not among those statutes that alter the balance of bargaining power and, thus, are not preempted *under Machinists*.[11]

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[11] As this Court has stated:

> It would further few of the purposes of the Act to allow unions and employers to bargain for terms of employment that state law forbids employers to establish unilaterally. "Such a rule of law would delegate to unions and unionized employers the power to exempt themselves from whatever state labor standards they disfavored." It would turn the policy that animated the Wagner Act on its head to understand it to have penalized workers who have chosen to join a union by prevent-

Nevertheless, Croson now argues that a "state minimum labor standards" exception to *Machinists* preemption applies to its claim herein. The Ohio Supreme Court correctly noted the flaw in Croson's argument: when the NLRB has ruled that a particular activity is "actually protected" under the NLRA, entirely different considerations —*Garmon* preemption considerations—apply. This Court has never held that when the state seeks to regulate conduct "actually protected" under the NLRA, it escapes federal preemption simply by characterizing its interference as a "minimum labor standard." Consequently, the Court has never applied the *Machinists*' "state minimum labor standards" exception to a *Garmon* preemption case. The Ohio Supreme Court did not, therefore, err by adhering to well-established *Garmon* preemption principles.

Even were this Court to rule that the "minimum labor standards" exception to *Machinists* preemption applies to an analysis of preemption under *Garmon*, the exception would not apply in this case. The Respondents did not assert, and the Ohio Supreme Court did not hold, that any "minimum labor standard," *i.e.*, any provision of the Ohio prevailing wage law or its administrative regulations, were preempted by federal labor law. Rather, the Court merely held that Croson's claim, which the Ohio Supreme Court properly characterized as an attempt "to thwart Local 189's use of its job targeting program," *J.A. Croson Co.*, 81 Ohio St.3d at 355, 691 N.E.2d at 663, App. at 16a, was preempted. Accordingly, the "minimum labor standard" exception to *Machinists* preemption is inapplicable.

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ing them from benefiting from state labor regulations imposing minimal standards on nonunion employers.

Metropolitan Life Ins. Co., 471 U.S. at 755-56 (citation omitted).

V. CROSON'S CLAIM HAS NO APPLICATION BEYOND THE PARTICULAR OHIO STATUTE AND ADMINISTRATIVE REGULATION AT ISSUE HEREIN.

This case does not warrant this Court's review for yet another reason. Croson's claim has no application beyond the particular Ohio statute and administrative regulation at issue herein. A decision by this Court reversing the decision below would not entitle Croson to the relief it requests and would have no effect beyond the particular Ohio statute and administrative regulation at issue.

Initially, it must be observed that Croson's claim is based upon an erroneous interpretation of R.C. 4115.07 and 4115.10(D) and Ohio Adm. Code § 4101:9-4-07. Croson correctly contends that R.C. 4115.07 and 4115.10 (D) *generally* require an employer to pay its employees on Ohio public improvement projects the full prevailing wage without unauthorized deductions or rebates. The sentence omitted by Croson from its "verbatim" reproduction of the statute in its Petition, however, expressly authorizes the deduction of union dues and assessments:

> This division does not apply to any agent or representative of a duly constituted labor organization acting in the collection of dues or assessments of such organization.

R.C. 4115.10(D).

To evade the obvious consequences of this sentence, Croson asserts that the administrative regulations adopted under the statute prohibit the deduction of job targeting dues. In particular, Croson argues that Ohio Adm. Code § 4101:9-4-07(B)(6), which permits deductions for "regular union initiation fees and membership dues, *not including* fines or *special assessments* . . ." (emphasis added), necessarily prohibits the deduction of job targeting dues.

To succeed with this argument, and therefore, to prevail on its purported state-law claim, Croson would have

to convince three levels of Ohio courts that the job targeting dues are somehow "special assessments" under the rule. The NLRB, in refusing to issue complaints challenging the withholding of job targeting dues, has repeatedly concluded that such dues are not "additional assessments," but rather are "periodic dues" required of all members. See, e.g., *Advice Memorandum, International Bhd. of Elec. Workers, Local 82 (Wagner-Smith Co.)*, Nos. 9-CA-30588, 9-CB-8493, 9-CB-8511, slip op. at 5-6 (July 8, 1993). Presuming Croson succeeded in convincing the Ohio courts to ignore the express holdings of the NLRB, it would further have to show that such an administrative prohibition did not contravene the statute, which explicitly permits the withholding of "assessments." R.C. 4115.10 (D).[12] The untenable nature of Croson's arguments on the merits of its claim, in and of itself, renders this case unsuitable for review by this Court.

Indeed, the limited nature of Croson's claim belies its assertion of great national significance. Petition at 11-12. Croson is not challenging the establishment or operation of Local 189's job targeting program, but only the withholding of job targeting dues by contractors on public improvement projects subject to the *Ohio* prevailing wage law. Furthermore, Croson has failed to direct this Court's attention to a statute or regulation of any other state or locality that is substantially similar to the regulation that is the lynchpin of its claim herein, Ohio Adm. Code § 4101:9-4-07(B)(6).

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12 Croson would also have to convince the courts that such deductions are not expressly permitted under Ohio Adm. Code § 4101:9-4-07(A)(1), which allows "[a]ny deduction from wages required by federal . . . law . . . ." Local 189 maintains that, having agreed to withhold union membership dues in the collective bargaining agreement, J.A. Guy and other signatory contractors are obligated by federal labor law to withhold all union membership dues for its employees who have signed and submitted valid dues check-off authorization forms.

Thus, Croson fails entirely to establish that this Court's ruling on the preemption of its claim under a specific Ohio administrative regulation will have any applicability outside of Ohio and outside of this lawsuit. Accordingly, this case does not warrant this Court's review.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari to the Supreme Court of Ohio should be denied.

Respectfully submitted,

N. VICTOR GOODMAN
Counsel of Record
MARK D. TUCKER
REX A. LITTRELL
BENESCH, FRIEDLANDER,
COPLAN & ARONOFF LLP
88 East Broad Street
9th Floor
Columbus, Ohio 43215
(614) 223-9343

Dated: August 17, 1998

APPENDIX

APPENDIX

APPENDIX

29 U.S.C. § 157. Right of employees as to organization, collective bargaining, etc.

Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 158(a)(3) of this title.

Ohio Revised Code § 4115.07 Prohibited Deductions from wages; payroll records; affidavit of compliance.

All contractors and subcontractors required by sections 4115.03 to 4115.16 of the Revised Code, and the action of any public authority to pay not less than the prevailing rate of wages shall make full payment of such wages in legal tender, without any deduction for food, sleeping accommodations, transportation, use of small tools, or any other thing of any kind or description. This section does not apply where the employer and employee enter into an agreement in writing at the beginning of any term of employment covering deductions for food, sleeping accommodations, or other similar item, provided such agreement is submitted by the employer to the public authority fixing the rate of wages and is approved by such public authority as fair and reasonable.

All contractors or subcontractors falling within or affected by sections 4115.03 to 4115.16 of the Revised Code, shall keep full and accurate payroll records with respect to wages paid each employee and the number of hours worked by each employee, covering all disbursements of wages to their employees to whom they are re-

quired to pay not less than the prevailing rate of wages. Such payroll records shall be open to inspection by any authorized representative of the contracting public authority, including the prevailing wage coordinator or the bureau of employment services at any reasonable time and as often as may be necessary, and such records shall not be destroyed or removed from the state for the period of one year following the completion of the public improvement in connection with which the records are made. There shall be posted in a prominent and accessible place on the site of the work a legible statement of the schedule of wage rates specified in the contract to the various classifications of laborers, workmen, and mechanics employed, said statement to remain posted during the life of each contract.

Each contractor or subcontractor shall file with the contracting public authority upon completion of the public improvement and prior to final payment therefore an affidavit stating that he has fully complied with sections 4115.03 to 4115.16 of the Revised Code.

Ohio Revised Code § 4115.10 Prohibitions; penalties paid to employee and department; complaints by employees.

(A) No person, firm, corporation, or public authority that constructs a public improvement with its own forces, the total overall project cost of which is fairly estimated to be more than the amounts set forth in division (B)(1) or (2) of section 4115.03 of the Revised Code, adjusted biennially by the administrator of employment services pursuant to section 4115.034 of the Revised Code, shall violate the wage provisions of sections 4115.03 to 4115.16 of the Revised Code, or suffer, permit, or require any employee to work for less than the rate of wages so fixed, or violate the provisions of section 4115.07 of the Revised Code. Any employee upon any public improvement, except an employee to whom or on behalf of whom restitution is made pursuant to division (C) of section 4115.13 of the Revised Code, who is paid less than the fixed rate

of wages applicable thereto may recover from such person, firm, corporation, or public authority that constructs a public improvement with its own forces the difference between the fixed rate of wages and the amount paid to the employee and in addition thereto a sum equal to twenty-five per cent of that difference. The person, firm, corporation, or public authority who fails to pay the rate of wages so fixed also shall pay a penalty to the administrator of seventy-five per cent of the difference between the fixed rate of wages and the amount paid to the employees on the public improvement. The administrator shall deposit all moneys received from penalties paid to the administrator pursuant to this section into the penalty enforcement fund, which is hereby created. The penalty enforcement fund shall be in the custody of the treasurer of state but shall not be part of the state treasury. The administrator shall use the fund for the enforcement of sections 4115.03 to 4115.16 of the Revised Code. The employee may file suit for recovery within sixty days of the administrator's determination of a violation of sections 4115.03 to 4115.16 of the Revised Code or is barred from further action under this division. Where the employee prevails in a suit, the employer shall pay the costs and reasonable attorney's fees allowed by the court.

(B) Any employee upon any public improvement who is paid less than the prevailing rate of wages applicable thereto may file a complaint in writing with the bureau of employment services upon a form furnished by the administrator. At the written request of any employee paid less than the prevailing rate of wages applicable, the administrator shall take an assignment of a claim in trust for the assigning employee and bring any legal action necessary to collect the claim. The employer shall pay the costs and reasonable attorney's fees allowed by the court if the employer is found in violation of sections 4115.03 to 4115.16 of the Revised Code.

(C) If after investigation pursuant to section 4115.13 of the Revised Code, the administrator determines there

is a violation of sections 4115.03 to 4115.16 of the Revised Code and a period of sixty days has elapsed from the date of the determination, and if:

(1) No employee has brought suit pursuant to division (A) of this section;

(2) No employee has requested that the administrator take an assignment of a wage claim pursuant to division (B) of this section;

The administrator shall bring any legal action necessary to collect any amounts owed to employees and the bureau. The administrator shall pay over to the affected employees the amounts collected to which the affected employees are entitled under division (A) of this section. In any action in which the administrator prevails, the employer shall pay the costs and reasonable attorney's fees allowed by the court.

(D) Where persons are employed and their rate of wages has been determined as provided in section 4115.04 of the Revised Code, no person, either for self or any other person, shall request, demand, or receive, either before or after the person is engaged, that the person so engaged pay back, return, donate, contribute, or give any part or all of the person's wages, salary, or thing of value, to any person, upon the statement, representation, or understanding that failure to comply with such request or demand will prevent the procuring or retaining of employment, and no person shall, directly or indirectly, aid, request, or authorize any other person to violate this section. This division does not apply to any agent or representative of a duly constituted labor organization acting in the collection of dues or assessments of such organization.

(E) The bureau shall enforce sections 4115.03 to 4115.16 of the Revised Code.

(F) For the purpose of supplementing existing bureau resources and to assist in enforcing division (E) of this

section, the administrator may contract with a person registered as a public accountant under Chapter 4701. of the Revised Code to conduct an audit of a person, firm, corporation, or public authority.

Ohio Adm. Code § 4101:9-4-07 Permissible payroll deductions.

(A) The following deductions from wages may be made without application to and approval of the bureau:

(1) Any deduction from wages required by federal, state, or local law;

(2) Any deduction of amounts required by court order, process, or judgment to be paid to another unless collusion or collaboration exists between the employer and the employee for whose benefit the deduction is made;

(3) Any deduction which constitutes a contribution by the employee to funds, plans, or programs established by the employer or representatives of employees, or both, for the purpose of providing either from principal or income, or both, medical or hospital care, pensions or annuities on retirement, death benefits, compensation for injuries in addition to that required by Chapters 4121, and 4123. of the Revised Code, compensation for illness, accidents, sickness, or disability, or for insurance to provide any of the foregoing, or unemployment benefits in addition to those required by Chapter 4141. of the Revised Code or vacation pay.

(B) The following deductions from wages may be made only if, prior to commencement of work by the employee on any project, employers procure and maintain, in writing, proof of voluntary deductions signed by the employee:

(1) Savings accounts or similar savings plans for the benefit of employees, their families and dependents;

(2) Any deduction constituting a contribution toward the purchase of United States defense stamps or savings bonds;

(3) Any deduction enabling the employee to repay loans to or purchase shares in credit unions organized and operated in accordance with federal and state credit union statutes;

(4) Any deduction for the making of contributions to governmental or quasi-governmental agencies;

(5) Any deduction for the making of contributions to legitimate charitable institutions;

(6) Any deductions to pay regular union initiation fees and membership dues, not including fines or special assessments, provided that a collective bargaining agreement between the employer and representatives of its employees permits such deductions and such deductions are not otherwise prohibited by law.

(7) Any deduction for the making of contributions to a state or federal political action committee.

(C) Any deduction from wages not specifically permitted in paragraphs (A) and (B) of this rule shall be permitted only upon approval of the public authority and the administrator and must meet the following criteria:

(1) The deduction is not otherwise prohibited by law;

(2) The employer does not make a profit or benefit directly or indirectly from the deduction in any form, including, but not limited to, commissions or dividends;

(3) The deduction is either voluntarily consented to by the employee in writing, prior to the period in which the work is to be done, where such prior consent is not a condition for obtaining or continuing employment, or is provided for in a bona fide collective bargaining agreement between the employer and representatives of its employees; and

(4) The deduciton serves the convenience and interest of the employee, his family or beneficiaries.

(D) Failure to provide evidence of voluntary deductions pursuant to paragraphs (B) and (C) of this rule constitutes a violation of section 4115.07 of the Revised Code.

(E) Failure to attain the approval of the public authority and administrator for any deduction taken pursuant to paragraph (C) of this rule constitutes a violation of section 4115.07 of the Revised Code.

(F) An employer withholding a permissible payroll deduction pursuant to paragraph (A), (B) or (C) of this rule shall maintain complete records of the wages withheld, including any and all receipts for donations, contributions, fees, and dues paid on behalf of the employee, from the deductions withheld by the employer.

(G) Failure to comply with paragraph (F) of this rule constitutes a violation of section 4115.07 of the Revised Code.

(H) Any records required to be maintained by this rule shall be made available to the public authority and the bureau upon request.

Supreme Court, U.S.
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No. 98-89

In The

Supreme Court of the United States

October Term, 1997

J.A. CROSON COMPANY,

Petitioner,

v.

J.A. GUY, INC., ET AL.,

Respondents.

On Petition For A Writ Of Certiorari To The Supreme Court Of Ohio

RESPONDENT J.A. GUY, INC.'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

FELIX C. WADE*
EDWIN L. SKEENS
SCHOTTENSTEIN, ZOX & DUNN
41 South High Street
Suite 2600
Columbus, OH 43215
(614) 221-3211
Counsel for Respondent J.A. Guy, Inc.
**Counsel of Record*

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

30 pp

QUESTION PRESENTED

Whether the Ohio Prevailing Wage Law and accompanying regulations are preempted to the extent that they would prohibit conduct protected by federal labor law, namely, an employer's deduction of Union dues from employee wages pursuant to employee authorization where the dues are used in a union job targeting program.

PARTIES TO THE PROCEEDING

The parties to the proceeding are as stated in the Petition for Writ of Certiorari. Respondent J.A. Guy, Inc. has no parent or subsidiary company.

TABLE OF CONTENTS

Page

QUESTION PRESENTED i

PARTIES TO THE PROCEEDING ii

TABLE OF AUTHORITIES v

STATEMENT OF THE CASE 1

STATEMENT OF FACTS 3

A. Local 189's Job Targeting Program 3

B. Awarding Of The Contracts At Issue 4

C. Deduction Of Union Dues Required By The Collective Bargaining Agreement 4

REASONS FOR NOT GRANTING THE WRIT 5

A. None Of The Compelling Reasons That Warrant Granting A Writ Of Certiorari Are Present Here 5

B. When Federally Protected Conduct Is Potentially Prohibited By State Law, Preemption Occurs Under Both the Supremacy Clause And *Garmon* 9

1. This Is A Straightforward Case Of Preemption Under The Supremacy Clause 9

2. Croson's Claims Are Preempted Under *Garmon* 13

a. Federal Preemption Also Applies When An Activity Is Arguably Protected Or Prohibited By Federal Law 13

TABLE OF CONTENTS – Continued

Page

b. Failure To Deduct Job Targeting Dues As Required By The Collective Bargaining Agreement Would Violate Federal Law 15

3. The Authority Cited By Croson Has No Relevance Here 16

a. *Dillingham Construction* Has Absolutely No Relevance Here 16

b. *Building and Construction Trades v. Reich* and *International Bhd. Of Electrical Workers v. Brock* Are Inapposite 17

C. THE STATE LAW AT ISSUE IS PREEMPTED EVEN IF IT IS A MINIMUM LABOR STANDARD 18

CONCLUSION 22

TABLE OF AUTHORITIES

Page

CASES

Brown v. Hotel & Restaurant Employees & Bartenders Internatl. Union Local 54, 468 U.S. 491 (1984) 20

Building & Constr. Trades Council v. Associated Bldrs. and Contractors, Inc., 507 U.S. 218 (1993) 14

Building and Construction Trades v. Reich, 40 F.3d 1275 (D.C. Cir. 1994) 17, 18

California Div. of Labor Standards Enforcement v. Dillingham Construction, 519 U.S. 316, 136 L.Ed.2d 791, 117 S. Ct. 832 (1997).....16, 17

Carpenters Local Union No. 1846 v. Pratt-Farnsworth, Inc., 690 F.2d 489 (5th Cir. 1982) 11

Communication Workers v. Beck, 487 U.S. 735 (1988) 14

Connell Constr. v. Plumbers and Steamfitters, 421 U.S. 616 (1975) 18

J.A. Croson v. Central Ohio Joint Vocational School Dist., 104 Ohio App. 3d 146, *jurisdictional motion overruled*, 74 Ohio St. 3d 1418 (1995), *cert. denied*, 517 U.S. 1155 (1996) 2, 6, 22

Farmer v. Carpenters, 430 U.S. 290 (1977)..... 10

Free v. Bland, 369 U.S. 663 (1962)..... 20

Independent Electrical Contractors of Greater Cincinnati, Inc. v. Hamilton Cty. Div. of Public Works, 101 Ohio App. 3d 580 (1995) 2

International Bhd. of Electrical Workers v. Brock, 68 F.3d 1194 (9th Cir. 1995)..... 17

TABLE OF AUTHORITIES – Continued

Page

Machinists v. Wisconsin Employment Relations Commn., 427 U.S. 132 (1976) 19

Manno Electric, Inc., 321 NLRB 278 (1996) 7, 10, 16, 18, 22

Metropolitan Life Ins. Co. v. Massachusetts, 471 U.S. 724 (1985) 19, 21

NLRB v. C&C Plywood Corp., 385 U.S. 421 (1967) 12, 15, 16

NLRB v. Katz, 369 U.S. 736 (1962) 15, 16

Railroad Trainmen v. Jacksonville Terminal Co., 394 U.S. 369 (1969) 9

San Diego Building Trades Council v. Garmon, 359 U.S. 236 (1959) 9, 13, 14, 15

Sears, Roebuck and Co. v. San Diego County District Council of Carpenters, 436 U.S. 180 (1978).....11, 12

Shen-Mar Food Products, Inc., 221 NLRB 1329, *enforced as modified*, 557 F.2d 396 (4th Cir. 1977) 15

State ex rel. Evans v. Moore, 69 Ohio St. 2d 88 (1982) 8

Weber v. Anheuser-Busch, Inc., 348 U.S. 468 (1955) 20

OTHER

NLRA §7, 29 U.S.C. §157 ..... *passim*

NLRA §8(a)(1) and (5), 29 U.S.C. §158 .....15, 19

NLRA/LMRA, 507 U.S. at p. 225 14

O.A.C. §4101:9-4-07 (B)(6).....8, 21

Ohio R.C. §4115.10 2

STATEMENT OF THE CASE

This case involves the claims of J.A. Croson Company ("Croson") that J.A. Guy, Inc. ("J.A. Guy") has violated state law by engaging in activity protected by federal law. The conduct at issue is J.A. Guy's deduction of union dues from employee wages for a job targeting program used by the Union to defray the costs of Union contractors so that more work will be available for Union members. Deduction of these dues is both required by the collective bargaining agreement to which J.A. Guy and the Union are parties and expressly protected by federal law. Under bedrock principles of federalism, federal law must prevail, and Ohio law cannot be applied to prohibit such federally protected conduct.

On June 15, 1993, Croson filed this action, alleging that J.A. Guy, a competitor, violated the Ohio prevailing wage statute by deducting union dues from wages paid to employees on two public improvement projects. The United Association of the Plumbers and Pipe Fitters Industry of the United States and Canada Local 189 ("Local 189") was also made a party to the action. On March 28, 1995, the trial court granted motions of J.A. Guy and Local 189 for summary judgment and held that application of the prevailing wage law as urged by Croson would allow the state to regulate the amount of dues which could be withheld from Union members' paychecks and the purposes to which those dues could be put and that these issues are preempted by federal law.

On May 8, 1995, Croson appealed to the Ohio Court of Appeals, Fourth District. On October 4, 1996, the

appellate court reversed the trial court's decision, creating a conflict with two other Ohio appellate court decisions establishing that state law challenges to deduction of union dues are preempted by federal law. *Independent Electrical Contractors of Greater Cincinnati, Inc. v. Hamilton Cty. Div. of Public Works*, 101 Ohio App. 3d 580 (1995), and *J.A. Croson v. Central Ohio Joint Vocational School Dist.*, 104 Ohio App. 3d 146, *jurisdictional motion overruled*, 74 Ohio St.3d 1418 (1995), *cert. denied*, 517 U.S. 1155 (1996).

The Ohio Supreme Court allowed appeals in this matter and determined that a conflict existed between the Ohio appellate decisions. The Court ordered the parties to brief the following issue:

> Whether federal labor law preempts a claim that a union employer's deduction of union dues for a union "industry advancement" or "job targeting" fund violates Ohio's Prevailing Wage Law, R.C. 4115.10, et seq., and state regulations adopted thereunder.

On April 8, 1998, the Ohio Supreme Court issued its decision, holding that the Ohio Prevailing Wage law and regulations thereunder were preempted to the extent that they could be construed to restrain the federally protected use of job targeting programs. The Court stated: "J.A. Croson's claims seek to invoke Ohio law to thwart Local 189's use of its job targeting program" and "the prohibitions that J.A. Croson seeks to enforce under Ohio law cannot peacefully coexist with the [NLRB's] classification of job targeting as 'concerted activity' protected by Section 7 of the NLRA." The Court held: "Because the NLRB has held that job targeting is *actually* protected by

the NLRA, there is no room for state regulation infringing that conduct." (Petitioner's App. 17a).

STATEMENT OF FACTS

A. Local 189's Job Targeting Program

Job targeting is a program used by Local 189 to level the playing field between union and non-union contractors and increase the amount of work done by union members. The program works by using union dues for payments to defray a union contractor's costs and thereby create more work for union members.

The targeting program was designed by the Union to promote competitive bidding. Before preparing a bid, a contractor submits a form titled a "Request for Target" identifying the project and estimating an approximate number of hours of work for the project. This information is used by the Union in deciding whether to make the project a targeted job. The Union subsequently informs the contractors whether the project is targeted and if so, the amount that will be paid to the successful bidder per hour up to a maximum amount. Any contractor can then submit a bid.

If the contract is awarded to a union contractor, the contractor subsequently receives targeted funds from Local 189 in the amount of the targeted rate multiplied by the number of hours worked up to a maximum amount. The contractor pays all employees on the project the full prevailing wage as required by the collective bargaining agreement.

The targeting program is simply an effective strategy, voluntarily adopted by union members, to make union contractors more competitive so that union members work more. Croson initiated this litigation because the program is working and helping union members to improve their wages, hours and working conditions, the rights protected by Section 7 of the National Labor Relations Act, 29 U.S.C. §157.

B. Awarding of the Contracts at Issue

On or about February 15, 1990 and November 25, 1991, Croson submitted bids for the construction of two projects – the new Pickaway County Jail and the Water Softening System for the Pickaway County Jail. Both of these jobs were prevailing wage jobs. Croson was unsuccessful in its bids and the jobs were awarded to J.A. Guy.

Croson challenges the deduction of union dues from wages paid on the two projects in question. As set forth below, said Union dues were deducted by J.A. Guy pursuant to the applicable collective bargaining agreement and remitted to Local 189, which then determined how the dues were used.

C. Deduction of Union Dues Required by the Collective Bargaining Agreement

Effective June 1, 1989, Local 189 entered into a collective bargaining agreement with the Mechanical Contractors Association of Central Ohio, Inc. J.A. Guy was at all times material a party to the collective bargaining agreement.

Pursuant to the collective bargaining agreement, J.A. Guy was obligated to pay established wages and fringe benefits. J.A. Guy deducted 3 3/4% of the gross wages paid to its employees on the Water Softening System at the Pickaway County Jail Project and the new Pickaway County Jail Project and remitted that amount to the Union as dues. Local 189 then determined how the dues were used.

All Union dues, regardless of their purpose, are subject to approval by members of Local 189 pursuant to periodic secret ballot. Dues deductions are authorized by members under voluntarily signed authorizations for dues check-off.

J.A. Guy does not separately deduct dues devoted to any particular purpose and does not deduct any "special assessments." J.A. Guy merely acts as an agent for Local 189 for the collection of dues and has no control whatsoever over the disbursement of Union dues collected. J.A. Guy has not made any deduction not specifically required by the collective bargaining agreement.

REASONS FOR NOT GRANTING THE WRIT

A. NONE OF THE COMPELLING REASONS THAT WARRANT GRANTING A WRIT OF CERTIORARI ARE PRESENT HERE

In arguing that this Court should grant certiorari, Croson is asking that this Court step in to protect *Ohio* law from being preempted by *federal* law. The Ohio Supreme Court, the court of last resort on issues of Ohio

state law and the protector of Ohio's interest in applying its own law, has unanimously concluded that Ohio law should not be applied to these facts. There is no reason that this Court should be more concerned than the Ohio Supreme Court about protecting Ohio law from preemption by federal law.

In 1996, this Court refused to grant certiorari in another case filed by the same petitioner, J.A. Croson, which, like this case, asserted a state law challenge to job targeting. *J.A. Croson v. Central Ohio Joint Vocational School Dist.*, 104 Ohio App. 3d 146, *jurisdictional motion overruled*, 74 Ohio St.3d 1418 (1995), *cert. denied*, 517 U.S. 1155 (1996). In *Central Ohio Joint Vocational School District*, Croson attacked job targeting using another state law theory, arguing that targeting violated state competitive bidding laws. Croson sought this Court's review of a May 30, 1995 decision by the Ohio Court of Appeals for the Twelfth Appellate District that followed the same reasoning as the Ohio Supreme Court's decision in this matter. The Court of Appeals held:

> Application of [state law] in this case would allow a state court to regulate the procedure by which a union administers job targeting. . . . [T]he trial court did not err in finding that Croson's state law cause of action would be preempted because it involves activity arguably protected under Section 7 of the NLRA. (opinion, p. 10).

Croson filed a petition for writ of certiorari, making the same arguments that are made in its current petition. This Court denied the petition for writ of certiorari.

For the same reasons that the Court refused to grant the writ in 1996, the writ should not be granted here. While federal preemption cases can sometimes be complex, this is a straightforward case of preemption under the Supremacy Clause. Preemption, in its most simple, direct and indisputable form, means that state law cannot be applied to prohibit what is expressly protected by federal law. Participation in job targeting programs has definitively been held to be protected conduct under Section 7 of the National Labor Relations Act. *Manno Electric, Inc.*, 321 NLRB 278 (1996). Preemption necessarily follows under a long line of decisions from this Court. As set forth in detail below, there is no conflict between the Ohio Supreme Court's decision in this matter and any decision of this Court or the Circuit Courts of Appeal.

The writ should be denied for the further reason that this is not a case of national importance. In claiming that targeting programs have nationwide impact, Croson cites statistics from two of the nation's thousands of local unions, Local 189 and a local union in Minnesota (pg. 12 of brief). Croson has also made no comparison between Local 189's use of job targeting funds and the use of those funds in any other targeting programs.

Furthermore, this case presents no significant policy issues. The payroll deductions used by Local 189 for job targeting were voluntarily approved by the employees whose pay is at issue. Accordingly, there is no threat, as Croson speculates, that deductions for targeting might grow to account for an increasingly large percentage of employee pay. Indeed, Croson's policy concerns are plainly hollow, inasmuch as Croson seeks to use the

prevailing wage law as a weapon to harm collective bargaining by interfering with the deduction of Union dues required to be deducted under collective bargaining agreements. Croson turns the law on its head in an effort to *attack* collective bargaining, when the state law was passed in an effort to *support* collective bargaining. *State ex rel. Evans v. Moore*, 69 Ohio St. 2d 88 (1982).

This case does not call into doubt Ohio's general authority to enforce its Prevailing Wage law. No party to this action has ever claimed that the Ohio Prevailing Wage Statute is somehow invalid in its entirety, nor has any party questioned its general applicability. Rather, the issue presented by this case is much more narrow. Croson claims that J.A. Guy's deduction of dues used by the Union for job targeting violated a regulation, Ohio Administrative Code §4101:9-4-07 (B)(6), which prohibits deduction of "special assessments". Preemption applies because that regulation cannot be interpreted or applied to prohibit deduction of union dues used for job targeting, inasmuch as the NLRB has held that such deductions are expressly protected by federal labor law. To this very limited, specific extent, federal and state law are in conflict, and federal law must prevail. There is no basis for concern that Ohio's entire system of regulation of prevailing wage is about to come crashing down.

B. WHEN FEDERALLY PROTECTED CONDUCT IS POTENTIALLY PROHIBITED BY STATE LAW, PREEMPTION OCCURS UNDER BOTH THE SUPREMACY CLAUSE AND GARMON

1. THIS IS A STRAIGHTFORWARD CASE OF PREEMPTION UNDER THE SUPREMACY CLAUSE

This case involves federal preemption in its most elementary form. Where federal law protects the conduct in question it is unnecessary to conduct voluminous reviews of the various types of federal preemption law or the policies of federal labor law to see that this is a classic case of preemption. If preemption ever applies, it applies here. Preemption boils down to federal law prevailing over state law. In this case this fundamental notion means that Ohio law cannot prohibit what federal law protects.

As the Ohio Supreme Court recognized, where state regulation would, in fact, inhibit federally protected activity, the preemption analysis is at an end. (App. 15a). The Court quoted the following portion of *San Diego Building Trades Council v. Garmon*, 359 U.S. 236, 250 (1959):

> The threshold question in every labor pre-emption case is whether the conduct with respect to which a State has sought to act is, or may fairly be regarded as, federally protected activity. Because conflict is the touchstone of pre-emption, **such activity is obviously beyond the reach of all state power.**

(emphasis added). The Ohio Supreme Court also properly heeded the caveat in *Railroad Trainmen v. Jacksonville Terminal Co.*, 394 U.S. 369, 383 (1969), where this Court held:

> In referring to decisions holding state laws pre-empted by the NLRA, ***care must be taken to distinguish pre-emption based on federal protection of the conduct in question . . . from that based predominantly on the primary jurisdiction of the National Labor Relations Board.*** . . .

(emphasis added) (App. 15a). *See also, Farmer v. Carpenters*, 430 U.S. 290, 295 (1977).

This case involves the branch of preemption based on federal protection of the conduct in question. In its brief, Croson loses its way and spends many pages of analysis on the doctrines of preemption based on the jurisdiction of the National Labor Relations Board. That error makes this case appear to be more complex than it really is.

There can be no question that the Ohio prevailing wage law, as interpreted by Croson, would prohibit the exact conduct that federal law protects. This requires preemption. Deduction of union dues for job targeting programs has already been held by the NLRB to be protected conduct under federal law in *Manno Electric, Inc., supra*. In *Manno*, a non-union contractor filed a state court lawsuit seeking to prohibit job targeting under several state law theories. The Administrative Law Judge noted that "Whether the Plaintiff may pursue a state lawsuit based on such a claim ***depends on whether the job targeting program is protected by the [National Labor Relations] Act.***" 321 NLRB 278, 298 (1996). The NLRB affirmed that the plaintiff's state law claims were preempted and that the filing of the state court lawsuit by the non-union contractor interfered with activities protected by the NLRA:

> Section 7 [of the NLRA] provides that employees shall have the right 'to engage in other concerted activities for the purpose of . . . other mutual aid or protection.' ***The objectives of the job targeting program are to protect employees' jobs and wage scales. These objectives are protected by Section 7.*** Thus, the plaintiff's [state court] suit, which interferes with, restrains, and coerces employees in their Section 7 rights, offends Section 8(a)(1) of the (National Labor Relations) Act. The claims which the Plaintiff sought to press were pre-empted.

[Emphasis added; *Id.*].

This authority squarely stands for the proposition that job targeting programs are protected by federal law and any state law is preempted to the extent that it limits or impairs such federally protected activity. The Ohio statute, as Croson interprets it, would regulate and prohibit the exact conduct that the NLRA authorizes and specifically protects. This requires preemption.

Croson nevertheless argues that preemption would apply only if Croson could have presented the identical controversy to the NLRB. In making this argument, Croson misapplies this Court's decision in *Sears, Roebuck and Co. v. San Diego County District Council of Carpenters*, 436 U.S. 180 (1978).[1] It is not important whether Croson

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[1] Croson could in fact have presented this matter to the NLRB. See *Carpenters Local Union No. 1846 v. Pratt-Farnsworth, Inc.*, 690 F.2d 489, 515-17 n. 11 (5th Cir. 1982) ("[A]ny person, even a stranger to the collective bargaining agreement can bring unfair labor practice charges.").

could have presented this controversy to the NLRB. That inquiry pertains only to the branch of preemption based on protecting the jurisdiction of the NLRB, not that based on federal protection of the conduct in question as involved here. *Sears*, 436 U.S. at 202.

Croson also suggests that even though job targeting is protected activity, this should not be the end of the preemption inquiry. Croson asserts that some circumstances might possibly exist, although they are not identified, under which state law might be applied to regulate, without completely prohibiting the federally protected activity of job targeting. The fundamental flaw in Croson's argument is that state law as interpreted by Croson would prohibit the use of job targeting **under any circumstances.** As expressly recognized by the Ohio Supreme Court, J.A. Guy could not both comply with its collective bargaining agreement *and* with Croson's interpretation of the Ohio prevailing wage law. Croson suggested in the courts below that J.A. Guy simply pay more than required under the collective bargaining agreement, so that after deduction of the Union dues for the targeting program, Union employees still receive what Croson considers the full prevailing wage. However, J.A. Guy would plainly violate federal law by unilaterally altering the terms of the collective bargaining agreements by changing employee wages. *NLRB v. C&C Plywood Corp.*, 385 U.S. 421 (1967). Moreover, increasing employee wages in the manner suggested would, in the words of the Ohio Supreme Court, "seriously hinder the effectiveness of job targeting programs and, in many instances, disadvantage union contractors in bidding on public improvement

projects" and thereby "largely offset their intended benefit." App. 22a, n. 3.

Croson's analogy to the use of state trespass laws to regulate federally protected picketing is thus unavailing. While state trespass laws may be applied to regulate the time, place and manner of picketing, state law as interpreted by Croson herein would completely bar the federally protected activity of job targeting.

2. CROSON'S CLAIMS ARE PREEMPTED UNDER *GARMON*

a. Federal Preemption Also Applies When An Activity is Arguably Protected or Prohibited by Federal Law

As set forth above, this is a simple, compelling case of preemption because the conduct involved, deduction of union dues for job targeting, has been expressly held to be protected under federal law. No further analysis is necessary. In the words of the Ohio Supreme Court, "Where state regulation would, in fact, inhibit federally protected activity, there is no need to invoke the primary-jurisdiction rationale set forth in *Garmon*." (App. 15a). *Garmon*, 359 U.S. at 250. However, a correct analysis of the doctrines of preemption law relating to the jurisdiction of the NLRB further supports the conclusion that preemption applies.

In *Garmon*, this Court held that states may not regulate an activity if that activity is either arguably protected or prohibited by the National Labor Relations Act. Under *Garmon*, preemption applies not only where there is a

conflict between state regulation and federal labor law, but also when there is a potential for conflict. *Id.* at 246.

In *Building & Constr. Trades Council v. Associated Bldrs. and Contractors, Inc.*, 507 U.S. 218 (1993), this Court said that preemption prohibits state regulation of activities that are either protected or prohibited by the NLRA/LMRA, and also those which are "only arguably" protected or prohibited by the NLRA/LMRA. 507 U.S. at 225. The Court concluded: "When we say the NLRA preempts state law, we mean that the NLRA *prevents a State from regulating within a protected zone.*" *Id.* at 226-227 (emphasis added).

The activities involved here – the check-off and collection of union dues or assessments under a collective bargaining agreement, and their intended use – are clearly within this protected zone. *Communication Workers v. Beck*, 487 U.S. 735 (1988). The *Beck* Court held that "there can be no doubt" that issues over the collection and use of union dues, fees and assessments, and claims against an employer and union about the collection and use of such funds, are governed by §8 of the NLRA and preempted by the *Garmon* rule. *Id.* at 742. The Court said that a claim about these activities "falls squarely within the primary jurisdiction of the [NLRB]." *Id.* The Court found that a challenge to the use of union dues for purposes other than collective bargaining is subject to Section 8 and therefore preempted under *Garmon*.

b. Failure to Deduct Job Targeting Dues as Required by the Collective Bargaining Agreement Would Violate Federal Law

As set forth above, *Garmon* preemption also applies when the regulated activity is actually or arguably prohibited by federal law. Preemption applies here for the further reason that J.A. Guy could comply with the Ohio prevailing wage law as Croson interprets it only by ceasing to deduct and remit the dues used by the Union for the job targeting program. This would constitute a breach of the collective bargaining agreement, which is itself a violation of federal labor law. It is well-established that an employer who ceases to deduct and remit union dues and other payments called for by a collective bargaining agreement violates NLRA §8(a)(1) and (5), 29 U.S.C. §158. *Shen-Mar Food Products, Inc.*, 221 NLRB 1329, *enforced as modified*, 557 F.2d 396 (4th Cir. 1977). Croson's claim is therefore preempted under *Garmon* for this additional reason.[2]

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[2] J.A. Guy also would not have the option of increasing employee wages to make up for the 2% of dues used by the Union for job targeting. It is well-settled that an employer cannot unilaterally modify a term or condition of employment which is a mandatory subject of collective bargaining. Under NLRA §8(d), an employer is required to bargain collectively as to "wages, hours, and other terms of employment." An employer violates NLRA §§8(a)(1) and (5) by unilaterally changing a term or condition of employment which is a mandatory subject of bargaining. *NLRB v. C&C Plywood Corp.*, 385 U.S. 421 (1967); *NLRB v. Katz*, 369 U.S. 736 (1962). Increases and decreases in wages are the clearest examples of mandatory subjects of bargaining under the NLRA, and an employer violates NLRA §§8(a)(1) and (5) by unilaterally increasing

3. THE AUTHORITY CITED BY CROSON HAS NO RELEVANCE HERE

Croson virtually ignores *Manno Electric* and the consequences of the NLRB's holding that participation in job targeting programs is protected activity under federal law. As interpreted by Croson, the regulation at issue would prohibit the exact conduct that federal law protects. This requires preemption. The authority cited by Croson does not change this conclusion.

a. *Dillingham Construction* Has Absolutely No Relevance Here

Croson relies heavily on this Court's decision in *California Div. of Labor Standards Enforcement v. Dillingham Construction*, 519 U.S. 316, 136 L.Ed.2d 791, 117 S. Ct. 832 (1997), which even a cursory analysis shows is inapposite. The issue in that case, as framed by this Court, was:

> This case presents the question whether the preemption provision of the Employee Retirement Income Security Act of 1974 (ERISA) [citation omitted] supersedes California's prevailing wage law to the extent that the law prohibits payment of an apprentice wage to an apprentice trained in an unapproved program.

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wages subject to a collective bargaining agreement. *NLRB v. C&C Plywood, supra,* (unilateral merit increases in wages); *NLRB v. Katz, supra* (same).

519 U.S. at ___, 136 L.Ed.2d at 796. The Court explained that the issue came down to "whether California's prevailing wage statute 'relate[s] to' that 'employee benefit plan' within the meaning of ERISA's preemption clause." *Id.* 136 L.Ed.2d at 799. Contrary to Croson's representation, *Dillingham* has nothing to do with preemption under federal labor law at all, let alone preemption relating to deduction of union dues as required by, and protected by, federal law. Croson also asserts that federal labor law preemption was addressed at the district court level in *Dillingham*, but a review of that decision shows that the district court carefully avoided the issue of whether a prevailing wage law could supersede collectively bargained-for wage rates: "The issue before this Court is the State's authority to require apprenticeship program approval, ***not the State's authority to preempt the collective bargaining process when it comes time to adjust apprentice's wage standards***. . . . " [emphasis added; 778 F. Supp. 1522, 1533 (N.D. Calif. 1991)].

b. *Building and Construction Trades v. Reich* and *International Bhd. of Electrical Workers v. Brock* are Inapposite

Croson relies upon two decisions involving the *federal* Davis-Bacon Act, *Building and Construction Trades v. Reich*, 40 F.3d 1275 (D.C. Cir. 1994), and *International Bhd. of Electrical Workers v. Brock*, 68 F.3d 1194 (9th Cir. 1995). Both cases have no relevance here because they are based solely on the provisions of the federal Davis-Bacon Act, and have nothing to do with preemption of state law.

Croson suggests that if preemption applied, it would have applied to prevent the federal courts in *Reich* and *Brock* from reaching their decisions construing the federal Davis-Bacon Act. This ignores the type of preemption applicable here. As held by this Court in *Railroad Trainmen, supra, state* law cannot be applied to prohibit what is protected by federal law under basic principles of federalism. Moreover, as expressly held in *Connell Constr. v. Plumbers and Steamfitters*, 421 U.S. 616, 626 (1975), "*federal* courts may decide labor law questions that emerge as collateral issues in suits brought under independent *federal* remedies, including antitrust laws." (italics added) The Court went on to state: "Although we hold that the union's agreement with Connell is subject to *federal* antitrust laws, it does not follow that *state* antitrust laws may apply as well." *Id.* at 635 (italics added).[3]

C. THE STATE LAW AT ISSUE IS PREEMPTED EVEN IF IT IS A MINIMUM LABOR STANDARD

Croson argues at length that the Ohio Prevailing Wage Law is not preempted because it is a minimum

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[3] Even if the Court were to conclude that there is a conflict between the interpretations of federal law by the NLRB in *Manno Electric, supra,* and the Circuit Court in *Building and Construction Trades v. Reich, supra,* this is obviously not the case for resolving any such perceived conflict. If such a conflict exists, it is between interpretation of two federal statutes, the NLRA and the federal Davis-Bacon Act. By contrast, this case involves a very different conflict between federal law and the Ohio Prevailing Wage law and particular regulations adopted thereunder.

labor standard enacted under the police power. Relying upon *Metropolitan Life Ins. Co. v. Massachusetts*, 471 U.S. 724, 749 (1985), Croson contends that federal labor laws do not preempt state labor regulations imposing minimal standards of employment.

Croson's analysis reflects a fundamental misunderstanding of the basis for preemption in this matter. *Metropolitan Life* was decided under a completely different preemption doctrine, *Machinists* preemption. In *Machinists v. Wisconsin Employment Relations Commn.*, 427 U.S. 132 (1976), this Court enunciated a separate, fundamental principle of federal labor law preemption, as follows:

> A second pre-emption doctrine protects against state interference with policies implicated by the structure of the Act itself, by pre-empting state law and state causes of action concerning **conduct that Congress intended to be unregulated.** The doctrine was designed, at least initially, to govern pre-emption questions that arose concerning **activity that was neither arguably protected against employer interference** by §7 and 8(a)(1) of the NLRA, **nor arguably prohibited** as an unfair labor practice by §8(b) of that Act. 29 U.S.C. §§157, 158(a)(1) and (b). Such action falls outside the reach of *Garmon* pre-emption.

(emphasis added) *Metropolitan Life, supra*, 471 U.S. at 349.

Machinists preemption does not pertain to conduct that is either clearly or arguably protected under the NLRA. Instead, it involves a range of activity that is not expressly regulated under the NLRA, but that Congress

intentionally left to be controlled by the free play of economic forces.

This case involves a very different, much stronger basis for preemption, inasmuch as state law is preempted because the conduct at issue is **actually protected by federal law**. As recognized by the Ohio Supreme Court, even if a state has a strong interest in applying its own law, state law cannot be applied to prohibit conduct that is protected by federal law. Citing this Court's decision in *Brown v. Hotel & Restaurant Employees & Bartenders Internatl. Union Local 54*, 468 U.S. 491, 502-503 (1984), the Ohio Supreme Court stated: "Preemption exceptions based on local interests are, in fact, inapplicable where state regulation would restrain or inhibit activity that is actually protected by Section 7 of the NLRA." (App. 18a). In *Brown*, this Court explained:

> If the state law regulates conduct that is actually protected by federal law, however, pre-emption follows not as a matter of protecting primary jurisdiction, but as a matter of substantive right. Where, as here, the issue is one of an asserted substantive conflict with a federal enactment, then **'[t]he relative importance to the State of its own law is not material** . . . for the Framers of our Constitution provided that the federal law must prevail. *Free v. Bland*, 369 U.S. 663, 666 (1962)." (Citations omitted).

(emphasis added). *Brown, supra*, 468 U.S. 491, 502-503 (1984). As this Court stated in *Weber v. Anheuser-Busch, Inc.*, 348 U.S. 468, 480 (1955), "Controlling and therefore superseding federal power cannot be curtailed by the State even though the ground of intervention be different

than that on which federal supremacy has been exercised." The fact that the Ohio Prevailing Wage law may have been enacted pursuant to the police power is therefore not material.[4]

Furthermore, Croson misapprehends the nature of the preemption issue, inasmuch as J.A. Guy and Local 189 do not now and have never contended that the Ohio prevailing wage law is preempted in its entirety. There is no dispute as to Ohio's authority under the police power.

The preemption issue presented by this case is much more limited than that described by Croson – it is the narrow issue of whether a specific regulation under the Ohio prevailing wage law can be applied to prohibit deduction of union dues as required by the collective bargaining agreement. Croson claims that J.A. Guy's deduction of dues used by the Union for job targeting violated O.A.C. §4101:9-4-07 (B)(6), which prohibits deduction of "special assessments". To this very limited, specific extent, federal and state law are in conflict. Therefore, the regulation relied upon is preempted only

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[4] This case is not about a minimum labor standard of the type referred to in *Metropolitan Life*. The regulation relied upon by Croson, O.A.C. §4101:9-4-07 (B)(6) prohibits certain deductions without regard to whether the amount of wages paid equals the prevailing wage. The regulation thus has nothing to do with a minimum level of wages. The issue in this case is not the total amount of wages paid by J.A. Guy. There is in fact no dispute that J.A. Guy paid the full prevailing wage, aside from the issue of whether 2% of the 3 3/4% of dues required to be deducted under the collective bargaining agreement constituted a prohibited deduction under the cited regulation.

as it is sought to be applied by Croson. The validity and general applicability of the Prevailing Wage Statute and Ohio's authority under the police power are simply not at issue here.

CONCLUSION

In 1996, this Court refused to grant a petition for a writ of certiorari filed by the same party, J.A. Croson, under very similar circumstances. *J.A. Croson v. Central Ohio Joint Vocational School Dist.*, supra, 74 Ohio St.3d 1418 (1995), *cert. denied*, 517 U.S. 1155 (1996). In that case, J.A. Guy asserted a state law challenge to a union job targeting program. In that case, like this one, the Ohio courts held that J.A. Guy's claims were preempted by federal law. For the same reasons that the Court refused to grant the writ in 1996, the writ should not be granted here. This is a straightforward case of preemption under the Supremacy Clause. Participation in job targeting programs has definitively been held to be protected conduct under Section 7 of the National Labor Relations Act. *Manno Electric, Inc., supra.* Preemption necessarily follows under a long line of decisions from this Court, and there is no conflict between the Ohio Supreme Court's decision in this matter and any decision of this Court or the

Circuit Courts of Appeal. Accordingly, the petition for writ of certiorari should be denied.

Respectfully Submitted,

FELIX C. WADE*
EDWIN L. SKEENS
SCHOTTENSTEIN, ZOX & DUNN
41 South High Street
Suite 2600
Columbus, OH 43215
(614) 221-3211
Counsel for Respondent
J.A. Guy, Inc.
**Counsel of Record*